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REPORTS OF CASES

DECIDED IN THE

2000/1
SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW

REPORTER

6

VOLUME 49.

SALEM, OREGON

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1908

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OCT 8 1908

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OF THE

SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

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LEE MOOREHOUSE	- - -	DEPUTY AT PENDLETON

*Judge Hailey retired from the supreme bench on January 15, 1907, by reason of the expiration of his term.

†Judge Eakin became an associate justice of the supreme court on January 15, 1907, having been elected to succeed Judge Hailey.

§Commissioners King and Slater were appointed by the Governor, and qualified on February 26, 1907.

†Julius C. Moreland was appointed clerk on June 22, 1907, succeeding John J. Murphy, deceased.

In explanation of the appearance in this volume of opinions written by commissioners, it should be stated that two supreme court commissioners were appointed by the Governor under the following act: Laws 1907, p. 53.

Section 1. The Governor of the State of Oregon shall, immediately upon the taking effect of this act, by and with the consent of the supreme court, appoint two persons of legal learning and personal worth to act as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties and in the disposition of numerous causes now pending and which may hereafter be pending in said court. The said commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of law. They shall each receive a salary equal (to) to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States and the Constitution of the State of Oregon, and to faithfully discharge the duties of the office of commissioner of the supreme court to the best of his ability.



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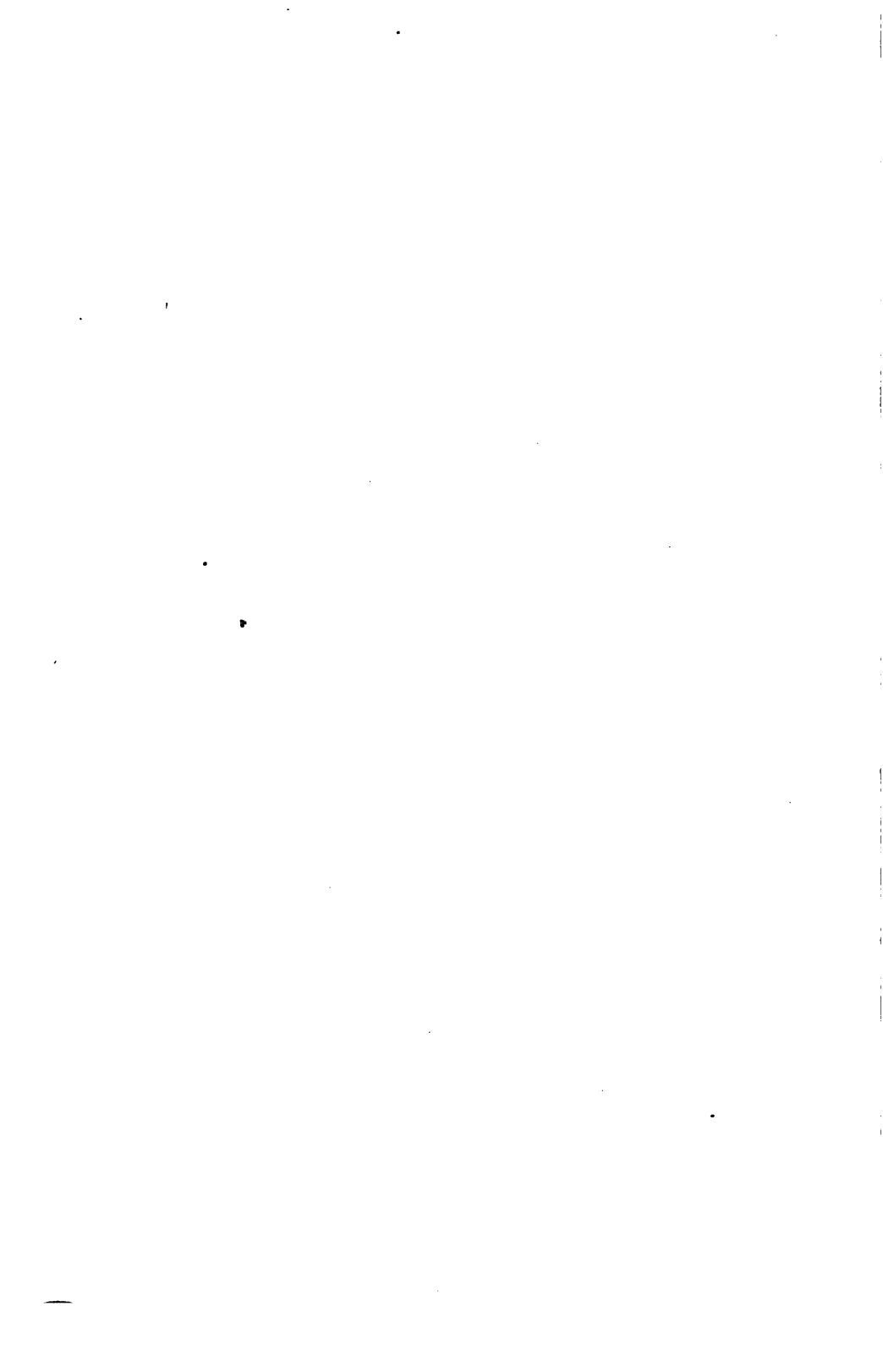
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IN MEMORIAM.

HON. REUBEN P. BOISE.

On the convening of the court on August 6, 1907, Mr. J. C. Moreland, clerk, addressed the court as follows:

May it Please the Court:

Full of years and crowned with honor, Hon. Reuben P. Boise has passed the veil which divides the seen from the unseen.

The death of such a man is deserving of more than a passing notice. For 57 years he has been one of the prominent figures of this country. His life work is written in large letters in the history of this state. For two-thirds of his life in Oregon he occupied a position on the bench. He was one of the first code commissioners which formulated the laws of the commonwealth. As one of the justices of this court when the laws were in their making, he did much to make the interpretation of those laws such as has reflected credit upon his sound judgment and great learning. His opinions were clear, forcible and sound, and his many opinions scattered through the Oregon Reports from the first to the last bear witness to his zeal and ability. For many years he has been the dean of the Oregon Bar, by reason of his age, long service on the bench, great ability and an integrity which was always absolutely spotless. His first opinions are recorded in 1 Oregon, and in 47 Oregon, the last report, this court has testified to his ability by affirming some of his decisions rendered on the circuit bench. His life was spent in the service of the state, and his fellow-citizens appreciated his work and duly honored him.

Though so far advanced in years, his step was erect, his mental activities bright to the last. He grew old gracefully. He was always and to the end genial, kindly and helpful to others.

To one who had so lived, death had no terrors for him. Calmly, peacefully and without regret, he approached his grave,

"Like one who wraps the drapery of his couch about him,
And lies down to pleasant dreams."

The Marion County Bar, in the county where nearly all of his life in Oregon had been spent, have met and adopted a memoir and resolutions expressive of their estimate of the man, the lawyer and the judge. These have been forwarded to me with a request that they be presented to this court, spread upon its journal and published in the forthcoming volume of Oregon Reports, all which I now ask.

The memoir and resolutions were ordered spread upon the journal of the court and published in the forthcoming volume of Oregon Reports.

MEMOIR AND RESOLUTIONS ON THE DEATH OF HON. R. P. BOISE.

At his residence, 960 Broadway, in this city, on Wednesday, April 10, 1907, at 2 o'clock P. M., Judge R. P. Boise passed to his final rest. He had been ill only a short time, and he retained his consciousness and his mental vigor up to within a few hours before the end came. The final dissolution was due to a complication of ailments.

Hon. Reuben P. Boise was one of Oregon's most honored pioneers. He came to Oregon in 1850, and was a prominent factor in shaping the destiny of the state.

Judge Boise was born in Blandford, Hampden County, Massachusetts, on June 9, 1818, and would have reached his eighty-ninth year on June 9, 1907. His father, Reuben Boise, was also a native of Massachusetts. The Boise family emigrated from France to Scotland, and later to the north of Ireland, and Judge Boise's paternal great great-grandfather emigrated to Massachusetts, locating on a farm, which is still retained in the family, and where Judge Boise's father was raised and lived all his life. Judge Boise's father was a farmer and a man of prominence, having held several offices in his state, among which were county commissioner and county clerk; he also represented his district in the state senate of Massachusetts.

Judge Boise's father was married to Miss Sallie Putnam, a relative of General Putnam, of Revolutionary fame; her father, Jacob Putnam, having served as a colonel during the whole of that struggle.

There were eight children born of this union—four sons and four daughters—and Miss Rebecca D. Boise, of Blandford, Massachusetts, is now the only surviving member.

Judge Boise was raised on his father's farm; was sent to the public schools, and took a classical course in Williams College, from which he graduated with honor in 1843. He came West to the State of Missouri, where he was engaged in teaching school two years, and returned to his native state and read law with his uncle, Patrick Boise, who was a distinguished lawyer of Westfield, Massachusetts. After three years' study of the law, he was admitted to the bar in 1848, and began the practice of his profession at Checopee Falls, where he remained two years, emigrating in the fall of 1850, via the Isthmus, to Oregon. He settled first in Portland, where he began the practice of the law in December, 1850, Portland then being a small place, with few inhabitants, but with plenty of shipping business.

His practice proved successful, and in the fall of 1852 he took up a section of land in Polk County, built a house, improved the property and resided on it for four years, and still owned it at his death.

In 1853 the territorial legislature elected him prosecuting attorney of the first and second districts. This comprised nearly all of the Willamette Valley south of Clackamas and Multnomah counties. He served in this capacity for about four years. In 1853 Judge Boise, Hon. James K. Kelly and Hon. D. Bigelow were elected code commissioners for Oregon, and he thus became one of the compilers of the first code of laws in book form in the Territory of Oregon, and, in fact, the founder of the present system of legal practice. In 1854 he was re-elected prosecuting attorney, and at the same election was elected to represent Polk County in the territorial legislature. Two years afterwards he was re-elected, and during both terms took an active part in its deliberations.

In 1857 he was representative for Polk County to the constitutional convention, where he was chairman of the committee on legislation, and prepared that portion of the constitution relating to the legislative department, and otherwise materially assisted in furnishing Oregon with her fundamental laws. In the same year he was appointed by President Buchanan one of the supreme judges of the territory. The next year, after the admission of the state into the Union, he was elected to that office, and from 1862 to 1864, inclusive, was chief justice. Upon the expiration of his term he was again elected for six years.

In 1870 he was again chosen by the people to fill that position, but Hon. B. F. Bonham, his competitor, having commenced an action to contest his seat on the bench, Judge Boise, not desiring to engage in long and expensive litigation, resigned and returned to the practice of his profession.

For several years Judge Boise was connected with the Ellendale Woolen Mill, which was located two miles west of Dallas and on the site that had formerly been occupied by the Neasmith Grist Mill. The Judge was president of the company that operated the factory. In 1870 the mill was destroyed by fire.

In 1874 the Judge was elected by the legislature as one of the capitol building commissioners, which office he held until 1876, when he was again elected to his old position on the supreme bench. Two years later, the legislature having divided the supreme and circuit judges into distinct classes, he received the appointment as one of the judges of the supreme court.

In 1880 he was elected judge of the third judicial district, which office he held continuously until July, 1892. After retiring from the circuit bench in 1892, he was appointed by the commissioner of Indian affairs, together with Hon. W. H. Odell and Major Harding, of Carthage, Missouri, to negotiate with the Siletz Indians for such of their lands as were in excess of what had been allotted to them in severalty. After an inspection of the lands, a successful treaty was made with the Indians that resulted in many thousands of acres being restored to the public domain.

From 1892 to 1898 Judge Boise practiced law. In this latter year he was again elected circuit judge, entering upon the duties of his office this last time at the age of 80 years and serving until July of 1904.

In 1851 Judge Boise was happily married to Miss Ellen F. Lyon, a native of Boston, and daughter of Mr. Lemuel Lyon, a Boston merchant. They had three sons, all born in Oregon—Reuben P., Whitney L. and Fisher A.—who all survive him. After 14 years of happy married life the devoted wife and mother died.

In 1867 he was married to Miss Emily A. Pratt, a native of Webster, Massachusetts, being a daughter of Mr. Ephriam Pratt, a manufacturer of that state. They had two daughters, Ellen S. and Mae E., the former of whom was drowned while bathing in the surf at Long Beach in the summer of 1891, and Mae E. resides at the family home with her mother.

Judge Boise came to Salem and has resided here continuously since 1857. He first purchased a block of lots in the city where the Academy of the Sacred Heart now stands, and lived there until 1865. In 1870 he purchased a farm in North Salem, where he resided up to the time of his death. It is the property on which the first house in Salem was built. This farm, however, has been platted into town lots, and what was then a farm is now a densely populated district of Salem. The Judge has added, from time to time, to the acreage of his donation land claim in Polk County, until there is now in one body 2,500 acres. Having been raised on a farm, he has taken an interest in agricultural affairs, and has been champion of legislation in Oregon in behalf of the farming interests; was five times elected master of the State Grange, and has attended a number of meetings of the National Grange held in different states.

He has also zealously aided the cause of learning, realizing by experience the benefit of a superior education. He was twice a member of the board of trustees of the Pacific University at Forest Grove; of the La Creole Academy at Dallas; and of the Willamette University at Salem, and took great personal interest

and was active in promoting their prosperity. Pacific University conferred on the Judge the honorable degree of Doctor of Laws.

Few, indeed, are the men who have led so useful and honorable a life, and seldom has it been the lot of man to serve his country for over fifty years continuously without a single tarnish on his record and evincing so high an order of legal ability and conscientious regard for his duty. This, combined with an excellent judgment and an indomitable independence of character, have made him the eminently successful jurist he has been.

He has exhibited the same independence of character and adherence to his sense of duty in politics. He began his political career as a democrat, with which party he affiliated until the time of the great civil war, when his loyalty to the government placed him on the side of the Union and in the ranks of the republican party. He held patriotic meetings all over Oregon, at which he delivered telling speeches and did much toward guiding public opinion against secession and toward saving the state to the Union. For this every right-minded citizen felt grateful toward him, but he experienced his greatest satisfaction for having done that which he considered his duty.

Viewed as a neighbor and friend, Judge Boise was kindly, generous and genuine; as a citizen he was modest, unassuming and easy of approach; as an officer he was conscientious and fearless.

He was a model Oregonian, and was regarded as such by his fellow-citizens. In the course of the long career of Judge Boise not the slightest doubt of his integrity ever arose. As an honest, incorruptible judge, his life is one that should challenge the admiration and emulation of every lawyer and good citizen. Judge Boise was one of the few men of whom it can be truthfully said, "he was incapable of doing a wrong act intentionally."

Resolved, that these memoirs be duly entered in the records of the court, and that a copy be furnished to the bereaved family

of our deceased brother, and also that copies be furnished to the newspapers for publication.

Done at Salem, Oregon, this 2d day of July, 1907.

Tilmon Ford,
R. S. Bean,
Wm. P. Lord,
Jno. B. Waldo,
George H. Burnett,
Committee.

Thereupon, it is ordered by the court that said resolutions be spread upon the record of this court, that a copy thereof be forwarded to the Supreme Court of the State of Oregon, to the family of Hon. R. P. Boise, deceased, and to the newspapers for publication.

Wm. Galloway,
Geo. H. Burnett,
Judges.

ERRATA.

Page 626, transpose lines 9 and 10.

Page 611, first word in the last line of headnote 20 should be "grantee" instead of "grantor."

CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Decided 12 January, 1907.

STATE ex rel. v. SIEBER.

88 Pac. 313.

CONTEMPT—AFFIDAVIT CONSTRUED AS A COMPLAINT.

1. The practice in Oregon in construing charges of contempt is more strict than formerly, and such a charge must now be made on the positive statement of the affiant, such affidavit being considered a complaint, to be governed by the rules of pleading, one of which is that the evidence must be limited to the allegations.

CONTEMPT—PLEADING—ALLEGATIONS AND PROOFS.

2. Where an affidavit filed in contempt proceedings charges defendant with violating an injunction commanding him not to interfere with the flow of water in a certain stream, the violation consisting of the erection of dams, it is error to admit evidence to show that defendant violated the injunction by cutting a ditch and turning water on his premises, for the defendant may thus be convicted of an act of contempt of which he has not been notified.

CONTEMPT—AMENDING AFFIDAVIT—DISCRETION.

3. Where the affidavit initiating a contempt proceeding is not sufficiently specific as to the charge, it may, with the court's consent, be amended, but must then be reverified.

CONTEMPT—PROPRIETY OF ARREST—DISCRETION.

4. Under Section 665, B. & C. Comp., providing that, on the filing of an affidavit stating the facts constituting a contempt, the court may either make an order on the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person before the court in the first instance, the selection of the procedure is discretionary with the court.

CONTEMPT—WAIVING IRREGULARITY IN WARRANT OF ARREST.

5. Although Section 668, B. & C. Comp., provides, in relation to the punishment of contempts, that the warrant of arrest shall direct whether

the person charged may be let to bail, and, if so, the amount necessary therefor, or specify that he be detained without bail, the omission of such provisions is an irregularity only, and does not affect the validity of the warrant. The defect should be particularly indicated to the trial court or it is waived and cannot be urged on appeal.

CONTEMPT—DUTY TO FURNISH COPY OF CHARGE—CONSTITUTION.

6. Although Const. Or. Art. I, § 11, provides that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, the right must be affirmatively demanded and refused to be available as a ground for appeal, the mere failure to deliver to defendant a copy of the charge is not sufficient.

CONTEMPT IN VIOLATING INJUNCTION—SUFFICIENCY OF AFFIDAVIT.

7. Although Section 663, B. & C. Comp., in relation to the punishment of contempts, provides that every court has power to punish contempt by fine or imprisonment, or both, but that it must appear that the right or remedy of a party to an action was defeated or prejudiced by the contempt before it can be punished otherwise than by a fine, in a proceeding for contempt, consisting of the violation of an injunction, an affidavit setting out the facts done in violation of the writ, and alleging that defendant had knowledge of the terms and conditions of the restraining order, is sufficient without alleging a demand on defendant to obey the injunction and cease violating its terms.

SAME—ALLEGING SEVERAL OFFENSES.

8. In a proceeding for a contempt consisting of the violation of an injunction restraining defendant from interfering with a certain stream, an affidavit charging that defendant had erected two dams in the stream above affiant's headgate does not necessarily charge the commission of more than one offense.

WITNESSES—PRIVILEGE OF EXEMPTION FROM TESTIFYING—CONSTITUTION.

9. Section 670, B. & C. Comp., providing that in a contempt proceeding the court shall examine the defendant, is not unconstitutional as compelling a defendant to testify against himself in a criminal prosecution, as forbidden by Const. Or. Art. I, § 12, since no form of contempt proceeding is a "criminal prosecution" within the meaning of that provision of the constitution.

From Baker: SAMUEL WHITE, Judge.

Contempt proceeding by the State on the relation of private parties to punish respondent for an alleged violation of an injunction. Respondent appeals from an order adjudging him guilty.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. Orville Bayland Mount* and *Mr. Albert Backus*.

For the State there was a brief with oral arguments by *Mr. Leroy Lomar*, District Attorney, and *Mr. John Langdon Rand*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a contempt proceeding instituted in the circuit court for Baker County by the State of Oregon on the relation of Baker Lodge No. 47, Ancient Free and Accepted Masons, a corporation; Baker City Lodge No. 25, Independent Order of Odd Fellows, a corporation; W. J. Patterson and F. W. Eppinger, partners as Patterson & Eppinger; and I. M. Welch, E. M. Welch, F. B. Welch, and C. R. Welch, partners as Welch & Co., against J. R. Sieber for an alleged violation of an injunction. The affidavit of the relator Patterson, on which the proceedings are based, was filed May 26, 1906, and states, in effect, that prior thereto a suit was commenced in the court named by the relators against Sieber and others, and, a preliminary injunction having been issued therein, Sieber was commanded not to interfere with the flow of 150 inches of water, miners' measurement, in a ditch from Sutton Creek to a cemetery owned by the relators, or to place any obstruction in that stream which would prevent the quantity of water specified from reaching the head of the ditch mentioned, a copy of which restraining order was served on him; that the injunction has never been set aside or modified, but, in violation thereof, Sieber unlawfully constructed in the creek two dams whereby the water was prevented from flowing to the head of such ditch, at a time when it was needed by the relators for irrigation. An order was thereupon made that a warrant be issued for Sieber's arrest, in pursuance of which he was apprehended and taken before the court, which denied a motion to dismiss the proceedings and overruled a demurrer to the affidavit. A plea of not guilty having been interposed, a trial was had resulting in a judgment imposing on Sieber a fine of \$50, and he appeals.

1. W. J. Patterson, as a witness for the relators, was permitted, over objection and exception, to state that Sieber, in violation of the injunction, had cut their ditch and turned water flowing therein upon a garden on his premises. It is maintained by defendant's counsel that, as the charge in the affidavit was the construction of two dams in Sutton Creek, whereby the water of that stream, to the extent of the alleged appropriation,

was prevented from flowing to the head of the cemetery ditch, an error was committed in admitting such testimony. It is argued by relators' counsel, however, that a court will take judicial notice of its own orders, made in a suit out of which the contempt arose, and, as the affidavit, which is not a "pleading" within the ordinary sense of that term, stated facts sufficient to confer jurisdiction, the testimony so objected to was admissible. It was formerly held by this court that an affidavit initiating a contempt proceeding for violating an order of court was not regarded as a pleading within the ordinary rules governing the construction of formal allegations of the parties of their respective claims and defenses: *State ex rel. v. McKinnon*, 8 Or. 487. In that case the affidavit was made on information and belief, but no objection seems to have been made thereto on that ground. In *State ex rel. v. Conn*, 37 Or. 596 (62 Pac. 289), it was ruled that an affidavit made on information and belief was insufficient to confer jurisdiction of a constructive contempt. It will thus be seen that a stricter rule than that which formerly obtained as to stating the facts constituting a contempt has been adopted. Our statute regulating the practice in cases of this kind provides that, when the offense is not committed in the immediate view and presence of the court, "before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court": B. & C. Comp. § 665. As a violation of an injunction is a criminal contempt, the proceedings to punish a party accused thereof must be strictly pursued (4 Enc. Pl. & Pr. 770), and, in all cases of constructive contempt, the initiatory affidavit must state facts sufficient to constitute a *prima facie* case: 4 Enc. Pl. & Pr. § 780.

2. The affidavit in the case at bar makes a case of that kind by stating that Sieber violated the injunction in a particular manner. He was thus specifically notified of the alleged offense, and, from such averments, he had the right to expect that the testimony to be offered against him would be limited to the charge. Instead of confining the examination to the case thus

made, testimony was received, over objection and exception, tending to show a violation of the order of the court in a manner different from that stated. The counsel for the relators, in support of the principle for which they contend, cite *Ex parte Ah Men*, 77 Cal. 198 (19 Pac. 380: 11 Am. St. Rep. 263), where it was held to be unnecessary to set forth, in an affidavit charging the violation of an injunction, the provisions of the writ that had been transgressed, because the court would take judicial notice of its own orders. The conclusion in that case was based on the fact that the practice prevailing in California permits the prosecution of a contempt to be made in the cause out of which the restraining order arose, and not in a separate proceeding with a title of its own. Such rule, however, does not obtain in this jurisdiction where contempt proceedings must be prosecuted in the name of the state or in its name on the relation of a private party: B. & C. Comp. § 667. Attention is also called to the case of *Jordan v. Circuit Court*, 69 Iowa, 177 (28 N. W. 548), where it was held that a failure to introduce in evidence in a contempt proceeding the order on which an injunction was based was not fatal, Mr. Chief Justice ADAMS saying: "The court would take judicial notice of its own orders in the matter out of which the alleged contempt grew." So, too, in *State v. Bee Pub. Co.* 60 Neb. 282 (83 N. W. 204: 50 L. R. A. 195: 83 Am. St. Rep. 531), another case relied upon by relators' counsel, it was held, in a contempt proceeding, that the court would take judicial notice of a case pending before it, to which a published criticism applied. It will thus be seen that the decisions reviewed relate to the absence of an averment in an affidavit and to the failure to introduce in evidence orders of courts, the violation of which constituted alleged contempts. That a court will take judicial notice of its orders made in certain cases must be admitted, but the notice referred to is a rule of evidence only, whereby proof of the existence of such orders, by the production of the originals or certified copies thereof, may be dispensed with. The statute makes the filing of an affidavit charging the commission of a constructive con-

tempt a prerequisite to the institution of the proceeding to punish a party for the alleged offense, and the testimony offered by the state or by a relator must be confined to, and correspond with, the sworn statement. A rule that would permit a *prima facie* case to be stated in the affidavit for the purpose of securing jurisdiction of the cause and allow the introduction of evidence of other contemptuous acts or conduct, not generally stated therein, would violate the elementary principles of pleading, by failing to give to the accused any notice of the offense for which he was to be tried. As a violation of an injunction is a criminal contempt, the rule governing pleadings in civil actions, at least, should be observed, that evidence must be limited to the issues.

3. No serious disadvantage can result from the application of this principle, for, if on a trial it should be ascertained that the affidavit initiating a contempt proceeding was not sufficiently specific in its charge, it may, with the court's consent, be amended by a reverification: *State ex rel v. Lavery*, 31 Or. 77 (49 Pac. 852). An error was, therefore, committed in admitting the testimony complained of.

In view of the conclusion thus reached, it is deemed proper to treat several questions that may arise again in this cause.

4. It is contended by defendant's counsel that the affidavit forming the basis of the measures taken fails to show the existence of any emergency necessitating the apprehension of their client without citing him to show cause why he should not be arrested to answer the charge, and, this being so, an error was committed in denying the motion to dismiss the proceedings. Our statute provides that, upon the filing of an affidavit stating the facts constituting a contempt, the court may either make an order upon the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person to answer in the first instance: B. & C. Comp. § 665. Before a person can be found guilty of a constructive contempt, the rule generally prevailing requires that he must have due and reasonable notice of the proceeding: 9 Cyc. 39. Where, however, a necessity for the immediate apprehension of

the party accused of violating an injunction is disclosed by the filing of the initiatory pleading, the right of the court to proceed in a summary manner is undoubted: *Rapalje*, Contempt, § 100. This rule proceeds on the ground that the mischief complained of might, in consequence of delay, become irreparable: *Fanshawe v. Tracy*, 8 Fed. Cas. No. 4,643. Our statute regulating the practice in such cases permits the making of an order to show cause, or allows the issuance of a warrant of arrest of the alleged contemnor in the first instance, as to the court may seem proper, thus making the selection of the procedure discretionary, and, this being so, no error was committed in refusing to dismiss the proceedings on that ground.

5. The statute prescribing the form of the warrant of arrest in contempt proceedings provides, in effect, that it shall direct therein whether or not the person charged may be let to bail for his appearance upon the writ, and, if so, to indicate the amount necessary therefor, or to specify in the process that he be detained in custody without bail: B. & C. Comp. § 668. The warrant issued in the case at bar not having contained either of these directions, the defendant's counsel maintain that an error was committed in refusing to discharge the accused. The motion interposed for that purpose was included in the application to dismiss the proceedings, and the grounds stated therefor are substantially as follows: (1) That no notice was given to the defendant to show why he should not be arrested; (2) that the affidavit on which the prosecution is based does not disclose any existing emergency, and hence the warrant was issued without authority; (3) that the court abused its discretion in ordering the defendant's arrest without giving him an opportunity to be heard, thus depriving him of his liberty without due process of law; and (4) that the defendant has never been served with a copy of the affidavit or other pleading in this cause. It will thus be seen that the question now insisted upon was not specifically presented to or evidently considered by the trial court. No application for a continuance appears to have been made, or motion interposed to admit the defendant to bail;

and hence any error in issuing the warrant was waived: *Zimmerman v. State*, 46 Neb. 13 (64 N. W. 375).

6. The fundamental law of the state contains the following clause:

"In all criminal prosecutions, the accused shall have the right * * to demand the nature and cause of the accusation against him, and to have a copy thereof": Const. Or. Art. I, § 11.

If it be assumed that a criminal contempt is a "criminal prosecution" within the generally accepted meaning of that phrase, the motion to discharge the defendant does not disclose that he demanded a copy of the affidavit or that a transcript thereof was denied him, and hence no error was committed as alleged.

7. It is maintained by defendant's counsel that, as the affidavit did not allege that the accused knew or had reason to believe that he was interfering with the relators' use of the water, or that he had been requested by them to comply with the terms of the restraining order, the pleading does not state facts sufficient to constitute a contempt, but that the sworn statement having averred that the injunction was violated by the defendant's constructing two dams. etc., manifests an attempt to charge the commission of more than one offense, and, the sufficiency of the pleading having been challenged on these grounds, an error was committed in overruling the demurrer. The acts complained of herein consist of an alleged disobedience of the court's process, a copy of which, it is averred, was served on the defendant. The failure of a party to comply with the order of a court, requiring him to perform some act for the benefit or to the advantage of the adverse party to a suit, action or proceeding, is a quasi or civil contempt, for a violation of which the punishment is executive only, and the contemnor, if found guilty, is adjudged to stand committed until he obeys the command, while disobedience or resistance of the process of a court constitutes a criminal contempt, a conviction of which incurs a penalty of fine or imprisonment or both, and is punitive: B. & C. Comp. § 663; *Rapalje*, Contempt, § 21;

Phillips v. Welch, 11 Nev. 187; *State v. Root*, 5 N. D. 487 (67 N. W. 958: 32 L. R. A. 723). In cases of civil contempt, the affidavit initiating the proceeding must aver that a demand has been made upon the party accused, requiring him to perform the duty commanded, before he can be considered in default: *State ex rel. v. Downing*, 40 Or. 309 (58 Pac. 863, 66 Pac. 917). Such rule, however, has no application to the case at bar where the offense complained of is a criminal contempt. An affidavit in a proceeding for a failure to observe an injunction is sufficient if it sets out the acts done in violation of the writ and avers that the party accused thereof had knowledge of the terms and conditions of the restraining order: *State ex rel. v. Lavery*, 31 Or. 77 (49 Pac. 852); *Hedges v. Superior Court*, 67 Cal. 405 (7 Pac. 767); *Ex parte Ah Men*, 77 Cal. 198 (19 Pac. 380: 11 Am. St. Rep. 263); *Silvers v. Traverse*, 82 Iowa, 52 (47 N. W. 888: 11 L. R. A. 804).

8. If it be assumed that an affidavit charging the commission of a constructive contempt should be as specific in the statement of the facts constituting the violation of a court's order as is required in setting forth in an information or an indictment the act or omission constituting the crime, the averment of defendant's construction of two dams does not necessarily allege that more than one offense was committed, for both obstructions to the flow of the water in the creek may have been placed therein at the same time. The affidavit in the case at bar stated facts sufficient reasonably to inform the defendant of the nature of the charge he was required to meet, and no error was committed in overruling the demurrer.

It is contended by defendant's counsel that, though the affidavit referred to purports to have been made in direct and positive terms, the testimony shows that it was based on information and belief, and hence an error was committed in denying their motion to dismiss the proceedings interposed on that ground when the cause was submitted. The legal principle insisted upon, if applicable, is without merit, for Patterson, as a witness for the relators, was asked on cross-examination:

"And then this affidavit was made from information you got through others and your general opinion?"

To which he replied:

"No, it was not; because there was no affidavit made until I saw the dam and saw what was holding the water back. The affidavit was made after I personally saw the dam."

The bill of exceptions shows that, Sieber having been called as a witness by the relators, his counsel objected to his giving any testimony against himself, but the objection was overruled and an exception allowed, whereupon he was interrogated in relation to the construction of one of the dams mentioned in the affidavit and as to the digging of a ditch from this dam towards land claimed by him, and it is contended that an error was thereby committed. It is argued by defendant's counsel that an affidavit charging the commission of a contempt initiates a criminal prosecution against the party so accused, and, although the statute provides that the court "shall proceed to investigate the charge by examining such defendant" (B. & C. Comp. § 670), the enactment violates the organic law of the state which contains the following declaration:

"No person shall be * * compelled in a criminal prosecution to testify against himself": Const. Or. Art. I, § 12.

The disobedience of any lawful judgment, decree, order or process of a court is deemed to be a contempt of the authority of such tribunal (B. & C. Comp. § 662, subd. 5), and, upon a conviction thereof, the accused may be punished by a fine or imprisonment or both, depending upon the magnitude of the offense or the effect thereof upon an adverse party's right or remedy which may have been defeated or prejudiced thereby: B. & C. Comp. § 663; *State ex rel. v. Downing*, 40 Or. 309 (58 Pac. 863, 66 Pac. 917). The defendant's counsel, in support of the legal principle for which they contend on this branch of the case, rely upon a decision of the Supreme Court of California (*Ex parte Gould*, 99 Cal. 360: 33 Pac. 1112: 21 L. R. A. 751: 37 Am. St. Rep. 57), where it was held that a person charged with violating an injunction could not be compelled to

be a witness against himself as the proceeding was of a criminal nature.

The right to punish persons found guilty of contempt is a power incident to every court of record, which it may exercise in the manner prescribed, when regulated by statute, for the purpose of maintaining order and enforcing its judgments and decrees. A court, therefore, which has no criminal jurisdiction is authorized to punish contemnors for a violation of its orders and for acts and conduct which tend to degrade such tribunal and to bring the administration of justice into reproach. The fundamental law of this state contains the following avowal:

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury": Const. Or. Art. I, § 11.

Mr. Bishop, in his work on Criminal Law (volume 2, 5 ed., § 269), in discussing the mode of trial in a contempt matter, says: "The proceeding is, in all cases, summary, before the judge, without the intervention of a jury." It is firmly settled by the great weight of authority that a party accused of the commission of a contempt is not entitled of right to a jury trial: 9 Cyc. 47; 4 Enc. Pl. & Pr. 789. The rule thus announced, though not involved herein, is adverted to by way of argument only, to show that, as a court of record is empowered to try a case of this kind without the intervention of a jury, the right to exercise such authority demonstrates that even a criminal contempt is not a "criminal prosecution" within the meaning of that term as used in the clause of the constitution last quoted. The case depended on by defendant's counsel is unsupported by other direct authority, and, believing that it is not founded in reason, we cannot adopt the rule thus promulgated. If the questions propounded to a party at his examination for the alleged commission of a contempt tended in any manner to incriminate him, he would be entitled to rely upon the constitutional guaranty invoked herein: 7 Am. & Eng. Enc. Law (2 ed.), 48; *Ex parte Sauls*, 46 Tex. Cr. R. 209 (78 S. W. 1073). In the case at bar the questions asked were not of that kind, and hence no error was committed in requiring the defendant to answer the inquiries.

The defendant's counsel object to the judgment rendered against their client on the ground that no findings of fact were made by the court. Whether or not such findings are necessary when the alleged contempt is based on an affidavit will not now be considered, for any doubts on that subject can be removed by making findings.

For the error committed in admitting testimony relating to the cutting of the cemetery ditch, the judgment is reversed, and a new trial ordered.

REVERSED.

Argued 26 December, 1906; decided 12 January, 1907.

WASHINGTON v. CLELAND.

88 Pac. 305.

CRIMINAL LAW—PAYMENT OF FINE PENDING APPEAL.

The rule that the voluntary payment of a judgment pending an appeal operates as a satisfaction of the judgment applies to both civil and criminal cases, and no appeal can be taken from a judgment imposing a fine after the amount has been deposited with the clerk, even if such deposit was made under protest and solely to prevent being put in jail after the trial judge had refused to grant a stay of execution or fix the amount of bail, there being no statute in Oregon providing for the deposit of the amount of a fine pending an appeal.

Original petition for a writ of mandamus by Nellie Washington to compel John B. Cleland, as a judge of the circuit court for the County of Multnomah, to sign a bill of exceptions or show cause why he should not do so. Respondent demurs to the petition.

DISMISSED.

For petitioner there was an oral argument by *MacMahon*.

For respondent there was an oral argument by *Mr. Harry King Sargent*.

MR. JUSTICE HAILEY delivered the opinion of the court.

The plaintiff filed her petition for an alternative writ of mandamus to compel the defendant to sign a bill of exceptions, or show cause why he should not do so, in a criminal action against her, tried before him as one of the circuit judges of the Fourth Judicial District, in which action she was found guilty

of assault, and judgment entered imposing a fine of \$200, or, in default of payment of such fine, that she be confined 100 days in jail. The petition alleges *inter alia* that the plaintiff gave notice of an appeal, served and filed the same immediately after judgment was entered against her, and presented a bond with sufficient sureties to the defendant, but that defendant stated that he would not fix a bond or grant a certificate of probable cause; that plaintiff was then remanded to the custody of the sheriff; and that, to release her from jail, "she paid into the coffers of the clerk of said court the sum of \$200, not as a fine, but as a deposit for her release until the proceedings herein before this court could be heard." Notice of petition having been served upon defendant, he has demurred to the sufficiency of the petition.

One of the questions raised by this demurrer is whether or not the payment of the \$200 to the clerk was a voluntary payment of the fine, and thus a satisfaction of the judgment, in which event no appeal would lie: *Batesburg v. Mitchell*, 58 S. C. 564-571 (37 S. E. 36); *Payne v. State*, 12 Tex. App. 160; *State v. Conkling*, 54 Kan. 108 (37 Pac. 992; 45 Am. St. Rep. 270); *State v. Westfall*, 37 Iowa, 575; *Madsen v. Kenner*, 4 Utah, 3 (4 Pac. 992); *Commonwealth v. Gipner*, 118 Pa. 379 (12 Atl. 306); *People v. Leavitt*, 41 Mich. 470 (2 N. W. 812); *Powell v. People*, 47 Mich. 108 (10 N. W. 129). There is no provision under our code for the deposit, pending an appeal, of the amount of a fine imposed. In *Batesburg v. Mitchell*, 58 S. C. 564 (37 S. E. 36), the defendants paid their fines under protest, and yet the court said: "We know of no authority by which a person who has been convicted before a magistrate and sentenced to pay a fine can obtain the advantages of an appeal and staying the sentence imposed upon him, by doing that which the law does not provide for, instead of that which the law does provide for. It is not for persons accused and convicted of criminal offenses to choose the mode which suits them best of staying the execution of sentences imposed upon them, pending appeal; but they must adopt the mode specially provided by law for.

that purpose. It seems to us, therefore, that, even if these fines were paid under the most formal protest, it would not have the effect of staying the sentence pending the appeal, but must be regarded as a compliance with one of the alternatives provided for in the sentence, and as putting an end to the case." So here, there being no provision under our code for such a deposit, the plaintiff cannot, by doing what the law does not provide, secure the advantage of an appeal; nor could the officers of the court receive the payment which she made for any purpose other than as a payment of the fine and release the plaintiff. The payment, therefore, must be considered as a voluntary payment of the fine. The fact that she made it to avoid going to jail does not make it any the less voluntary; for, if she had not tried to appeal, she would have been compelled to make the payment anyhow to avoid a like result. She simply chose one of the alternatives provided for in the sentence. The payment having been voluntary, the judgment was therefore satisfied, and, upon the authorities heretofore cited, no appeal would lie therefrom.

The determination of this question makes it unnecessary to pass upon the other questions raised by the demurrer. The demurrer will therefore be sustained, and the petition dismissed.

DISMISSED.

Decided 12 January, 1907.

HEILNER v. SMITH.

88 Pac. 299.

JUDGMENT—RES JUDICATA.

1. A material issue litigated and necessarily decided by the judgment rendered is forever settled between the parties and those in privity with them, and cannot again be litigated.

SAME—CASE UNDER CONSIDERATION.

2. Where S sued H in trover for conversion, and H denied the conversion, and alleged that he bought the chattel of S, and that it was then agreed that moneys due him from S should be applied on the purchase price, but H did not plead as a counterclaim or set-off the items of money due from S or demand any relief on account thereof, the verdict therein for S merely determined that there was no purchase, so that the question of money due H was not a material issue in the cause, and was,

therefore, not determined by the judgment and the verdict does not estop H from suing for such items.

APPEAL—OBJECTION NOT MADE BELOW—DEFAULT THROUGH OVERSIGHT OF COURT—WAIVER BY NOT OBJECTING.

3. A default judgment ought not to be entered against a party who has presented an issue on any material point in the case, but if such an order is entered, counsel must within a reasonable time call the error to the attention of the trial court, otherwise it will be considered waived—it is not an error that can be first presented on appeal.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by S. A. Heilner, doing business as Heilner Commercial & Commission Company, against John P. Smith and another, doing business as partners under the firm name of John P. Smith & Son, to recover \$286.78 for goods, wares and merchandise sold and delivered, cash advanced, and money loaned by plaintiff to the defendants between the 9th day of June, 1904, and the 27th day of June, 1905. The complaint is in the usual form.

The defendants answered, denying all the material allegations of the complaint and for a further and separate defense and by way of estoppel and former adjudication averred, in substance, that on August 31, 1905, the defendants commenced an action of trover against the plaintiff to recover damages for the wrongful conversion by him of 14,652 pounds of wool, alleged to be of the reasonable value of \$2,930.40; that in such action the plaintiff herein and defendant therein answered, denying the conversion as charged, and for an affirmative defense pleaded that on January 12, 1905, he contracted for the purchase of the wool in question from the defendants herein and plaintiffs therein for 15½ cents per pound, such wool to be delivered when sheared; that at the time of such contract he advanced \$25 on the purchase price of the wool, and it was understood and agreed, as a part of the contract, that the sum of \$180.98, then due him from the defendants herein for goods, wares and merchandise, and any further sum which they might owe at the time of the delivery of the wool should be deemed a part of such purchase price and so applied; that the wool

was delivered on July 1, 1905, and the defendants herein were then indebted to plaintiff in addition to the amounts above mentioned in the sum of \$76.25 on account and \$20.05 for money paid for hauling the wool; that on July 1 he tendered to the plaintiffs in such action the purchase price of the wool, less the amounts above stated, but they refused to accept the same; that a reply was filed to such answer, denying all the material allegations thereof, and thereafter the cause was regularly tried by the court and a jury upon the issues joined by the pleadings and the jury found a verdict in favor of the plaintiffs therein and assessed their damages at the sum of \$2,344.32, and judgment was rendered accordingly; that the account for goods, wares and merchandise, money advanced and loaned, as stated in the answer filed in the action referred to, were and are the same items mentioned in the complaint in the present action and upon which it is founded.

A demurrer to this separate answer or plea of former adjudication was sustained by the court below on the 5th day of January, 1906, and the defendants allowed until the following day to amend. No further proceedings, however, were had in such action until June 12, 1906, when it came on for trial pursuant to notice, whereupon the defendants' counsel asked permission of the court to file an amended answer, which being denied because the proposed answer was substantially the same as the original, they declined to plead further, and, on motion of the plaintiff's counsel, judgment was rendered in his favor as prayed for in the complaint. From this judgment the defendants appeal, assigning as error the sustaining of the demurrer to the separate answer and the entering of judgment against them without disposing of the issues made by their general denials.

AFFIRMED.

For appellant there was a brief over the names of *Morton D. Clifford* and *Lomax & Anderson*, with oral arguments by *Mr. Clifford* and *Mr. Leroy Lomax*.

For respondent there was a brief over the name of *Hart & Smith*, with an oral argument by *Mr. Julius Newton Hart*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It is contended that the matters constituting the cause of action in the present case were all tried and determined in the action of trover brought by Smith against Heilner, and that the judgment therein is a bar to this action. The rule is undisputed that, where an issue has been once litigated and determined in a court of competent jurisdiction, a judgment rendered thereon forever bars and estops the parties or their privies from again litigating the same matter: *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442); *Hall v. Zeller*, 17 Or. 381 (21 Pac. 192); *Ruckman v. Union Ry. Co.* 45 Or. 578 (78 Pac. 748; 69 L. R. A. 480). But, to render a judgment available as a bar to a second action against the same parties upon a different claim or demand, it is essential that the issue in the second action was a material issue in the first and necessarily determined by the judgment therein: 1 Van Fleet, Former Adj. § 277; 1 Freeman, Judgments (4 ed.), § 256.

2. The defendants' liability to the plaintiff on the account alleged in the complaint was not tried or determined in the former action. That was an action of trover, brought by the defendants against the plaintiff to recover for the wrongful conversion of personal property. The plaintiff denied the conversion, and, as a further and separate defense, pleaded that he had contracted for the purchase of the property in controversy, and that the several items making up the account now in suit were to be deemed and considered as payments on such contract. The jury found against the plaintiff and in favor of the defendants, and so determined that there was no contract of purchase as alleged by the plaintiff, but that he was guilty of a wrongful conversion of the property and assessed his damages accordingly. Upon this verdict, judgment was rendered in favor of the defendants. The items going to make up the payments on an alleged contract which the jury found did not exist became, therefore, immaterial to any question in the cause necessary for a decision and were not adjudicated or determined by the judgment. They were not pleaded as a counterclaim or set-off to the

action of trover, nor was any relief demanded on account thereof, and there is no presumption that the jury deducted the amount of such items from the damages so assessed against the plaintiff. These items were simply set up and referred to in the answer as a part of the terms of the alleged contract of purchase, and, when that contract was found not to exist, they ceased to be of importance in the case. The question to be decided was whether Heilner wrongfully converted the property to his own use as defendants alleged or received possession thereof under a contract of purchase as he averred, and the determination of that question in favor of the defendants ended the case. The demurrer to the plea of estoppel was, therefore, properly sustained.

3. The remaining question is one of practice. It is common learning that a judgment cannot be rendered against a party without his consent while he has a pleading on file and undisposed of tendering an issue: 6 Enc. Pl. & Pr. 82; *Crafts v. Clark*, 31 Iowa, 77. But when a party stands by and permits a court, under a mistake as to the condition of the pleadings, to render a judgment against him, he cannot avail himself of such error on appeal: *Hopkins v. Donaho*, 4 Tex. 336. At the time the judgment was rendered defendants' counsel were present in court, and, so far as the record discloses, made no objection whatever to such judgment. They did not call the attention of the court at that, or any subsequent, time to the fact that the original answer contained a general denial of the allegations of the complaint, and therefore cannot insist in this court for the first time that the court erred in disregarding such answer.

AFFIRMED.

Decided 12 January, 1907.

GRAY v. COLUMBIA CENTRAL RAILROAD CO.

88 Pac. 297.

CARRIERS—WHO ARE PASSENGERS.

1. Plaintiff was the servant of one who had contracted with a railroad company, the contract requiring the railroad to transport the contractor's servants. When the road was sufficiently completed the company put on a train, consisting of a water tank car, some freight cars, and a passenger coach. When the conductor and crew of such train were preparing to

take the locomotive and tank car to a certain place, the contractor requested the conductor to carry plaintiff there on the tank car, and while riding thereon plaintiff was injured owing to the derailment of the train. There was a rule of the company forbidding freight conductors to allow passengers on freight cars. *Held*, that, under the facts, plaintiff was a passenger on the train.

SAME—CONTRIBUTORY NEGLIGENCE.

2. It appearing that it was customary for the contractor's servants, when being carried in the performance of their duty, to ride on flat cars, etc., and that plaintiff had no knowledge of the rule in question, he was not guilty of contributory negligence.

From Gilliam: WILLIAM L. BRADSHAW, Judge.

Action by Frank T. Gray, by J. T. Gray, his guardian *ad litem*, against the Columbia River & Oregon Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of W. W. Cotton, Arthur Champlin Spencer and W. A. Robbins, with an oral argument by Mr. Spencer.

For respondent there was a brief over the name of Dufur & Riddell, with an oral argument by Mr. Enoch Burnham Dufur.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for a personal injury. During the spring and summer of 1905, the defendant company was engaged in the construction of a railroad from Arlington to Condon in this state. McCarty & Co. had a contract for fencing the right of way, and had gangs of men at work at different points along the line. Under their contract the company was to carry their material and to transport their employees from place to place without charge. About July 1 the road was so far completed that the company put on a regular week-day train between Arlington and Condon, consisting of a water tank car, freight cars and a combination passenger and baggage coach. The water tank car was an ordinary flat car with wooden tanks built thereon, and was used for carrying water from Rock Creek to points along the road as needed, and was a part of the equipment of the regular train. On Sunday morning, August 13, the conductor and crew of this train were preparing to take

the engine and tank car from Condon to Rock Creek for the purpose of picking up some cars previously left there. McCarty & Co. had a crew of men at work at or near Rock Creek who were nearly out of provisions, and Loring, a member of the firm, requested and obtained permission from the conductor to put some provisions on the tank car to be taken down to them, and directed the plaintiff, one of their employees, a lad about 15 years of age, to get on the car and ride down to Rock Creek to watch the provisions and see that they did not fall off. After the boy got on the car, Loring asked the conductor if he wanted a pass for him, and the conductor replied that he could not take it very well, as he had no way of handling passengers and could not turn it in, but he permitted the boy to ride without objection, and there is no evidence that the boy knew of the conversation between Loring and the conductor, or that the conductor had no authority to carry him. On the way down to Rock Creek, the engine and front trucks of the tank car left the track, owing, as it is alleged, to the unsafe and unfinished condition of the track and to the excessive and dangerous rate of speed at which the train was moving. The plaintiff was thrown from the car and injured, and to recover damages therefor brings this action by his guardian. He had verdict and judgment in the court below, and defendant appeals.

1. There are several assignments of error, but they are all involved in the contention: First, that the relation of passenger and carrier did not exist between plaintiff and the defendant; and second, that plaintiff was guilty of such contributory negligence in riding on the tank car as will preclude his recovery. The defendant gave in evidence a rule of the company which provides that "freight conductors must allow none but train crew to ride on freight cars," and it is argued that, by reason of this rule, the conductor of the train on which plaintiff was riding at the time of his injury had no authority to bind the defendant by receiving him thereon as a passenger. A railroad company may separate its passenger and freight businesses, providing certain trains in which passengers may be carried and

others devoted to the exclusive transportation of freight, and in such case the conductor of a freight train has no implied authority to receive passengers thereon or to bind the company by his act in so doing: *Simmons v. Oregon Railroad Co.* 41 Or. 151 (69 Pac. 440, 1022; 27 Am. & Eng. R. Cas. [N. S.] 896). But there are two reasons why the rule introduced in evidence and the doctrine above stated can have no application to the case at bar. In the first place, the conductor who permitted plaintiff to ride was not a freight conductor. He was the regular conductor of the only passenger train defendant was operating on its road, and the car upon which plaintiff was riding at the time of his injury was a part of such train and under his charge. In the second place, the plaintiff was on the car in the performance of a duty he owed his employers, McCarty & Co., and was being carried in pursuance of a contract between such employers and the defendant company. He was not advised that the conductor had no authority to take him on the car, and any secret instructions of the defendant to the conductor would not be binding on him.

2. Nor was he guilty of contributory negligence, *per se*, in riding on the tank car: *Wagner v. Missouri Pac. Ry. Co.* 97 Mo. 512 (10 S. W. 486; 3 L. R. A. 156); *Milbourne v. Arnold Elec. P. & S. Co.* 140 Mich. 316 (103 N. W. 821; 70 L. R. A. 600). He was there by permission of the conductor, the defendant's agent in charge of the train. The evidence shows that it was customary for employees of McCarty & Co., when being carried from one point to another in the performance of their duty, to ride on flat cars, on top of box cars, and elsewhere on trains wherever convenient, and he cannot be held conclusively guilty of contributory negligence in following such practice. This is not a case of a stranger riding on a train of a railway company after the road has been completed and is under the sole charge of the operating department, but it is that of an employee of a contractor on an uncompleted road being carried in discharge of his duty in pursuance of an agreement between his employer and the company. He was on the train of right and by the consent

of the agent of the defendant in charge thereof, and was not knowingly violating any rule of the company. He was not being transported or receiving carriage as a mere favor or gratuity or by fraud, but he was lawfully upon the train, and, if it was negligently managed by the defendant's agents and injury resulted to him, he is entitled to recover: *Torpy v. Grand Trunk Ry. Co.* 20 Up. Can. Q. B. 446; *Sheerman v. Toronto, G. & B. Ry. Co.* 34 Up. Can. Q. B. 451.

It follows from these views that the judgment must be affirmed, and it is so ordered.

AFFIRMED.

Decided 12 January, 1907.

EATON v. BLACKBURN.

88 Pac. 303.

TRIAL—WITNESS—INDICATING EXPECTED ANSWER.

1. A request of an expert witness: "State whether or not this hay you saw there is considered as marketable hay here in Baker City, compared with other kind that is sold here"—sufficiently advises the court as to what was sought to be proved by the witness so that the court could determine whether the answer was material and relevant without a statement by counsel.

SALES—INFERIOR QUALITY—CONSTRUCTION OF PLEADINGS.

2. In an action for breach of contract to purchase hay where defendants alleged that plaintiff agreed to sell them good, No. 1, merchantable hay, a reply denying that the hay delivered was not good or merchantable and controverting all other allegations of new matter in the answer, is equivalent to denying that plaintiff stipulated to sell No. 1 hay, and evidence that the hay delivered was merchantable is within the issues.

WORDS AND PHRASES—MERCHANTABLE AND MARKETABLE.

3. The words "merchantable" and "marketable" are practically synonymous, as applied to property sold by quality and description.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by A. E. Eaton against Edward Blackburn and C. H. Breck, partners as Blackburn & Breck, to recover the sum of \$233.70. The facts are that the defendants agreed to purchase from the plaintiff five car loads of baled hay, f. o. b., at Nodine Spur, Union County, to be transported to Baker City, and to pay therefor \$11.50 a ton. The plaintiff shipped two car

loads, containing 20 tons and 645 pounds, but the defendants, never having seen any of the hay before it reached Baker City, refused to accept it on the ground that it was not of the quality represented and so notified the plaintiff, who thereupon instituted this action. The answer denied the material allegations of the complaint, and averred that plaintiff agreed to sell and deliver to the defendants on the cars, at the place and price stated, 50 tons of good, No. 1, merchantable hay, expressly warranting that it should be of that quality, upon which representations they relied. A breach of the conditions is then alleged to the effect that the hay shipped was not as represented, whereby the defendants sustained damages in the sum of \$50, for which judgment was demanded. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, judgment was rendered against the plaintiff for the costs and disbursements, and he appeals. REVERSED.

For appellant there was a brief with oral arguments by *Mr. Leroy Lomax* and *Mr. Gustav Anderson*.

For respondents there was a brief with oral arguments by *Mr. John Langdon Rand* and *Mr. Samuel White*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. M. S. Hughes, as plaintiff's witness, testified that he had managed a farm for 20 years; that he was familiar with the handling and selling of hay; and that he had minutely examined the hay in question, and was asked:

"Have you seen and observed hay selling in the market here in Baker City this winter; do you know the kind of hay that is sold here by the stores?"

He answered:

"Yes; I have."

Q. "State whether or not this hay you saw there is considered as marketable hay here in Baker City, compared with other kind that is sold here?"

An objection to this question on the ground that it was incompetent, irrelevant and immaterial, and that the witness had not shown himself qualified, having been sustained, an excep-

tion was saved and it is contended by plaintiff's counsel that an error was thereby committed. It is argued by defendants' counsel, however, that the question asked does not indicate who, if any person, "considered" the hay marketable; that an answer to the question would have permitted a comparison of the hay shipped with other hay claimed to have been sold in various places without attempting to show that such other hay was marketable, thereby permitting the witness to speculate as to what he believed other persons thought of the hay and excluding his own knowledge in relation thereto; and that no statement was made by plaintiff's counsel of what he expected to prove by the witness; and hence no error was committed as alleged. The object of stating what fact is expected to be proved by a witness who is not permitted to answer a question is to advise the court thereof, so as to enable it to determine whether or not the testimony offered is relevant and material: *Stanley v. Smith*, 15 Or. 505 (16 Pac. 174); *State v. Savage*, 36 Or. 191 (60 Pac. 610, 61 Pac. 1128). When the answer sought, however, is reasonably inferable from the question asked, it is not necessary to state what testimony is thus expected: *Beers v. Aylsworth*, 41 Or. 251 (69 Pac. 1025). The court was sufficiently advised, from the question asked, to determine whether or not the answer sought was material and relevant, and, this being so, plaintiff's counsel was not required to state what the witness would say in response to the inquiry.

2. The defendants allege in their answer that the plaintiff agreed to sell to them good, No. 1, merchantable hay. The reply denies that the hay delivered was not good or merchantable, and further controverts all other allegations of new matter in the answer. This is equivalent to denying that plaintiff stipulated to sell No. 1 hay. As a witness in his own behalf, he testified that the hay shipped to the defendants was mixed timothy that was good for feeding stock, but not first-class because it was bleached. This declaration under oath tended to show that the hay was "good" and the plaintiff had the right further to prove that it was "merchantable"—that is, salable in the market

because of its fitness to feed stock (*Wood v. United States*, 11 Ct. Cl. 680)—and thus confine the proof to the issue for which he contended.

3. An examination of the question to which objection was made will show that Hughes was asked to state whether or not the hay which the plaintiff shipped to the defendants was considered as "marketable" at Baker City when compared with the kind of hay which he knew had been sold therein in the winter of 1905-06. It will be remembered that the answer alleges that the plaintiff agreed to sell "merchantable" hay, and that the question adverted to specifies "marketable" hay. One of the definitions given in Webster's International Dictionary of the word "marketable" is: "Wanted by purchasers; salable." So that the term used in the question is sufficiently synonymous with the word "merchantable" as used in the answer to limit the inquiry to the issue. True, the witness was not asked to declare who "considered" the hay marketable, but it is reasonably to be deduced from the context of the question that it was so deemed by himself, and, inferentially, by the persons who purchased the kind of hay he had seen sold in Baker City that winter. Hughes' examination disclosed that he was qualified to testify in relation to the question asked, in refusing to permit him to answer which, we think, an error was committed, and, this being so, the judgment is reversed, and a new trial ordered.

REVERSED.

Argued 18 December, 1906; decided 12 January, 1907.

STATE v. BOOK.

88 Pac. 318.

MOVING TO SET ASIDE INDICTMENT—STATUTES—GRAND JURY.

1. Section 1349, B. & C. Comp., prescribing the grounds on which an indictment may be set aside, is exclusive of all other reasons for such a motion, and an indictment will not be set aside because the court excused a grand juror at his own request after he had been accepted and sworn, for reasons personal to himself and not because of sickness or physical or mental inability to perform the duties required.

CRIMINAL LAW—ASSAULT BEING ARMED—PRESUMPTION OF INTENT.

2. Where a person uses a deadly weapon with violence upon the person of another, and the act has a direct tendency to do some great bodily

injury to the one assailed, the intent to injure him may be inferred from the act, under B. & C. Comp. §788, subd. 3, declaring that the law presumes that a person intends the ordinary consequences of his voluntary act.

INSTRUCTION ASSUMING FACTS—PROVINCE OF JURY.

3. Where, on a trial for assault with a dangerous weapon, the evidence of the state showed that defendant committed the offense and he relied on an alibi, an instruction that it was not necessary to prove a specific intent, that the law presumed the intent "from the fact that defendant was armed with a dangerous weapon, and that he made an assault while so armed," is erroneous as assuming that defendant was armed with a weapon, which was a controverted fact.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Charles Bock appeals from a conviction of assault while armed with a dangerous weapon, said to have been committed upon a sailor on the lumber schooner Johan Paulson, at the Inman-Paulson dock in Portland, on June 12, 1906. **REVERSED.**

For appellant there was a brief with oral arguments by *Mr. Raphael Citron* and *Mr. Edward Mendenhall*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *John Manning*, District Attorney, and *Bert Emory Haney*, with an oral argument by *Mr. Haney*.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendant, Charles Bock, was convicted in the circuit court for Multnomah County of the crime of assault, being armed with a dangerous weapon, and appeals from the judgment which followed. His counsel contend that an error was committed in denying a motion to set aside the indictment on which he was tried. The uncontradicted affidavits filed in support of the motion, copies of which are set out in the bill of exceptions, state in effect that on June 18, 1906, a grand jury was duly drawn, impaneled and sworn by that court, of which inquisitorial body one Olaf Akeyson was a member; that after Akeyson was so accepted, he learned that witnesses might be called before the grand jury to testify in relation to alleged violations of the election laws at Sellwood, where he resided; that he thereupon explained to the judge, at chambers, that he had legally voted at that place by establish-

ing his right, by affidavit, to exercise such franchise; that on June 19, 1906, in consequence of what he had learned concerning the criminal charges that might be made against his neighbors, he applied to the court to be relieved from further service on the grand jury, which request having been granted, one T. A. Reynolds was selected in his stead, whereupon he resumed his duty as a trial juror, which he was then able to discharge; and that, after such substitution, the pretended grand jury returned the indictment herein, which the defendant, before pleading to the merits, moved to set aside on the ground that it was not found as required by law.

1. It is argued that Akeyson, having been selected as a grand juror, made no application, before he was sworn, to be discharged, or gave any reason why he should not serve, and the court, being satisfied that he was qualified, accepted him; that, after the formation of the jury, as Akeyson had not become sick or for any reason was unable to continue in the discharge of his duty—which are the only reasons given to relieve a grand juror from service (B. & C. Comp. § 1272)—the court was powerless to discharge him or to direct that another person should be drawn to take his place; and that, as the organic law and the statutes require that a grand jury shall consist of seven persons, five of whom must concur to find an indictment (Const. Or. Art. VII, § 18; B. & C. Comp. §§ 961, 1265), the selection of Reynolds as a grand juror, after the formation of that body, made it consist of eight persons, thereby rendering it incompetent to find an indictment, and hence an error was committed as alleged. Our statute, evidently modeled after the rule generally understood as prevailing at common law, forbids a challenge to the panel from which the grand jury is drawn or to an individual grand juror, unless made by the court, for want of qualification, before the juror is accepted: B. & C. Comp. § 1269. Notwithstanding such prohibition, a motion to set aside an indictment, if interposed before pleading to the merits (*State v. Witt*, 33 Or. 594, 55 Pac. 1053), may be made on the following grounds:

“(1) When it is not found, indorsed and presented as prescribed in Chapter 7 of Title XVIII of this Code; (2) when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon”: B. & C. Comp. § 1349.

The chapter and title to which reference is thus made relate to the number of grand jurors who must concur to find an indictment, the indorsements required to be made thereon (B. & C. Comp. § 1294), and the manner of presenting the written accusation: B. & C. Comp. § 1296.

In *State v. Whitney*, 7 Or. 386, the defendant at the proper time moved to set aside an indictment returned against him on the ground that at a session of the grand jury an unauthorized person was present and examined witnesses upon whose testimony he was formally charged with the commission of a crime. The motion having been denied, the defendant was tried and convicted, and appealed from the judgment which was rendered against him. In reviewing the action of the court in denying the motion, Mr. Chief Justice KELLY, referring to the provisions of the statute hereinbefore quoted (B. & C. Comp. § 1349), says: “These, we hold, are the only two cases for which an indictment can be set aside; and, as the section prohibiting any person other than the district attorney from appearing before the grand jury, is not in Chapter 7, there was no error in the ruling of the court.” In *United States v. Benson*, 31 Fed. 896, a plea in abatement to an indictment, which is tantamount to a motion to set aside such pleading, was interposed in the United States Circuit Court for the District of California, for the reason that certain of the grand jurors which found the indictment were not taxpayers of that state. In denying the motion, it was held that a similar statute of California, specifying certain grounds upon which an indictment might be set aside, and applicable to the practice in that court, afforded the only reasons that were available for that purpose, and, as the lack of such qualification was not enumerated in the act, the plea was ineffectual. In deciding that case, Mr. Justice FIELD says: “The provisions of the statute, passed to bring

offenders against the laws to trial, are not to be so construed as to defeat their purpose. The various proceedings prescribed are the means designed, not merely to protect the accused, but also to protect the public, and are to be enforced, on the one hand, so as to secure to the accused a full and fair trial, and, on the other hand, so as not to prevent the punishment of crime."

In the case at bar, the motion to set aside the indictment did not negative any of the grounds specified in Chapter 7 of Title XVIII of the Code, as reasons therefor; and, this being so, it is unnecessary to consider whether or not the court, pursuant to the provisions of Section 1272, B. & C. Comp., was authorized to discharge the grand juror who was released, or to select another in his stead. The strict rule, once enforced as to the qualifications of grand jurors and the presence of unauthorized persons at sessions of a grand jury, seems to have been very much relaxed in those states that have adopted statutes prescribing the grounds upon which an indictment may be set aside, which enactments are usually construed on the principle that the inclusion of the reason thus assigned necessarily excludes all other grounds not enumerated. If, however, under the section of the statute last adverted to, a court can only discharge a grand juror after he has been impaneled, when some necessity demands his departure, and that, when released from the performance of inquisitorial duty, he is required to remain in attendance as a trial juror, is such an irregularity as demonstrates that the exigency did not exist that would warrant his exemption from service as a grand juror, the remedy must be sought by application to the legislative assembly to amend the statute by enlarging the grounds upon which an indictment may be set aside. We conclude, therefore, that no prejudicial error was committed in denying the motion interposed.

2. An exception having been taken to the following instruction, it is contended by defendant's counsel that an error was committed in giving it, to wit:

"It is not necessary, in a case of an indictment for assault with a dangerous weapon, to prove specific intent; that is, to

prove a specific intent to commit the assault. The law will presume this intent to commit the assault—that is, to commit the assault in the manner alleged—from the fact that the defendant was armed with a dangerous weapon, and that he made an assault while so armed with such weapon.”

The charging part of the indictment is as follows:

“The said Charles Bock, on the 12th day of June, A. D. 1906, in the County of Multnomah and State of Oregon, then and there being armed with a dangerous weapon, to wit, a revolver, loaded with gunpowder and leaden bullets, did wilfully, unlawfully and feloniously assault one Walter Safer, by then and there pointing and discharging the said revolver, so loaded as aforesaid with gunpowder and leaden bullets, at and against the body of him, the said Walter Safer, he, the said Charles Bock, being then and there within shooting distance of him, the said Walter Safer, contrary,” etc.

The bill of exceptions states in effect that testimony was introduced by the state tending to prove the averments of the indictment, and by the defendant setting up an alibi. The law presumes that a person intends the ordinary consequences of his voluntary act (B. & C. Comp. § 788, subd. 3), and hence, when a deadly weapon is used with violence upon the person of another, and such act has a direct tendency to do some great bodily injury to the person assailed, the intent so to injure him may reasonably be inferred from the act.

3. In *State v. Gibson*, 43 Or. 184 (73 Pac. 333), it was held that a person accused of the commission of a crime was presumed innocent until he was proven guilty, and, in speaking of the burden of proof in such cases, Mr. Justice WOLVERTON says: “It never shifts, and the ultimate question for the jury is whether, in view of all the facts shown, the accused has been proven guilty.” The defendant’s theory is that he was not present when Safer is alleged to have been assaulted, and, for that reason, there was no admission that he did the shooting. The court assumes, however, from the instruction, that he was armed with a weapon with which he made an assault. The use of the word “defendant” in the part of the charge complained of shows that the instruction is not hypothetical; but, as it assumes

the existence of facts which are disputed, an error was committed as alleged: *State v. Mackey*, 12 Or. 154 (6 Pac. 648); *State v. Bowker*, 26 Or. 309 (38 Pac. 124); *State v. Hatcher*, 29 Or. 309 (44 Pac. 584).

For the error committed in giving the instruction, the judgment is reversed, and a new trial ordered. REVERSED.

Argued 18 December, 1906; decided 12 January, 1907.

EX PARTE TANNER.

88 Pac. 301.

PLEA OF GUILTY AS A CONVICTION.

1. Whether one who has pleaded guilty has been "convicted" of the offense with which he is charged is discussed but not decided.

ATTORNEY—PUNISHMENT FOR PERJURY—EXTENUATING FACTS.

2. Although the commission of the crime of perjury involves moral turpitude justifying the removal of an attorney, under Section 1067, B. & C. Comp., the facts in this case do not require so extreme a penalty, and a suspension for ninety days will accomplish the purpose of the law.

Proceedings for the disbarment of Albert Hawes Tanner, on a charge of perjury, presented by the Grievance Committee of the State Bar Association. SUSPENDED.

For the petition there was an oral argument by *Mr. Frank Salisbury Grant*.

Contra, there were oral arguments by *Mr. William Wick Cotton* and *Mr. Charles Erskine Scott Wood*.

PER CURIAM. This is a proceeding instituted by the Grievance Committee of the State Bar Association for the removal of Albert H. Tanner, an attorney of this court. The information charges that on February 8, 1905, the grand jury of the United States, inquiring for the District of Oregon, returned an indictment against Tanner, charging him with the crime of perjury; that upon his arraignment Tanner entered a plea of guilty, but that no further proceedings were had in such action until July 17, 1906, when, on motion of the government, the indictment was dismissed for the reason that Tanner had been

pardoned by the President of the United States. It is then averred, as conclusions of law rather than as facts, that the plea of guilty amounted to a conviction of a felony involving moral turpitude, and that the pardon did not absolve Tanner from the consequences of such conviction or restore him to his right to hold public office. Tanner answered, admitting the facts as stated in the information, but denying the conclusions of law therein, and for a further and separate answer alleged:

"That, after this respondent had pleaded guilty to said indictment, the Honorable Charles B. Bellinger, District Judge of the United States for the District of Oregon, and having full jurisdiction of the matter, suspended sentence and all further proceedings in the matter, and nothing further was done, save and except that this respondent was granted a full and unconditional pardon for said offense by the President of the United States, and, before said pardon was issued, this respondent was called as a witness in the case of John H. Mitchell, and, being duly sworn as a witness, was objected to by the said Mitchell on the ground that this respondent had been convicted of a felony under the provision of Section 5392, Revised Statutes of the United States* (U. S. Comp. St. 1901, p. 3653), and the presiding judge at said trial, Judge DE HAVEN, ruled that this respondent was a competent witness, for the reason that no judgment or conviction had ever been pronounced in the matter, and this respondent alleges that he has never been convicted of any felony within the meaning of Sections 1067 and 1057 of the laws of Oregon, known as Bellinger & Cotton's Code.

"And for a further and separate answer and defense this respondent alleges that said alleged perjury was committed, not in the actual trial of any cause, but during the appearance of this respondent before a grand jury of the United States, sitting at Portland, Oregon, to investigate certain alleged criminal acts of John H. Mitchell, Senator of the United States, and that this respondent appeared before said grand jury only as a citizen, and said alleged perjury did not occur in any professional matter, or in the discharge of any professional duty to any court or client.

"And for a further and separate answer and defense, this respondent admits, without any reservation whatever, that, in testifying before the grand jury which sat to investigate the charges

*5 Fed. Stat. Ann. 701.

against Senator John H. Mitchell to facts other than those which were the strict and absolute truth, this respondent made a great mistake and committed a wrong which will follow him through his entire career, and this respondent does not, by this answer, or by any subsequent proceeding which he shall take in this matter, intend to belittle the gravity of his offense, but, in extenuation of this offense, he shows to this honorable court the substantial facts of the matter, as follows:

"This respondent had been a close and intimate friend of Senator John H. Mitchell since 1882, and his partner in the practice of the law since 1890, and that said Senator Mitchell had been the close friend, for a lifetime, of this respondent's father-in-law, and, at the time Senator Mitchell returned to Oregon from Washington and appeared to testify before the grand jury investigating the charges against him at Portland, Oregon, Senator Mitchell assured this respondent that these attacks against him were the result of political intrigue and the persecution of his enemies in the political faction opposed to him. He represented to said respondent that, at the worst, the practice of taking money for appearances before the department had at one time been customary and proper, and that the charges themselves were simply an accusation of a breach of the written law, and not a breach of any inherent morality, and he implored me, in the most pathetic manner, to stand between him and disgrace and ruin in his old age, after a lifetime of public service, and he represented that his fate was in my hands, and mine alone.

"Senator Mitchell was a man of a most amiable character, and respondent felt for him a warm friendship and a sympathy which he cannot express, and he felt that he was under the obligations of loyalty to him which justified his joining him in his effort to protect himself in his old age from the assaults of political enemies. He was made to feel, and did feel, that, if he refused to protect him in his extremity, he would occupy the position of an ingrate and a traitor, and he desires to say, as a part of his sworn answer, that it was a situation difficult to judge by any who have not been placed in a similar position.

"This respondent alleges that he begged and entreated Senator Mitchell to go before the grand jury with the facts just as they were and make no concealment, but that Senator Mitchell said that, under ordinary circumstances, he would do so, but this was a case in which neither justice nor mercy would be shown him; that the grand jury had been carefully selected and that any-

thing like an honest confession of the facts would have a result which the facts themselves did not warrant and would ruin him forever; that he could not hope to have another term in the senate, and that all he asked now was to be allowed to go into the retirement of old age and not end his days in the common jail, and, though this respondent, until the last, protested against what he was asked to do, this respondent did not have the strength to resist the most heartrending pleadings of a man like Senator Mitchell, to whom this respondent was tied by bonds of long association, obligation and most kindly feeling, and it was under these circumstances that this respondent, as an individual citizen, appeared before the said grand jury, and, rather than seem a traitor to Senator Mitchell, this respondent testified that the partnership agreement between this respondent and Senator Mitchell was to the effect that all moneys paid for services in the Land Department belonged to this respondent individually, whereas in fact this was not so, but said moneys belonged to Senator Mitchell and to this respondent jointly.

"And this respondent shows to the court that it has never been alleged, and it cannot truthfully be alleged, that this respondent had any advantage to gain, by his false testimony before said grand jury, or that he was in any way personally interested in what said grand jury might or could do, but that his conduct was influenced wholly and entirely by a feeling of loyalty toward Senator Mitchell and a great pity for his distress. And this respondent shows that afterward he appeared in open court, the said grand jury being present, and told the whole truth, exactly as the facts warranted, and that he so testified when sworn as a witness, during the course of the trial. This respondent further shows to the court that he has practiced law in the City of Portland for more than twenty-five years, without any blemish on his name, either personal or professional; that he has no other profession or means of earning a livelihood, and he does not believe that this one mistake, under the circumstances above suggested, amounts to such moral turpitude as renders him an untrustworthy and unfit member of the honorable profession of the law, but he believes that, without any danger to society, or any injury to this honorable profession, which is itself an advocate of mercy, he ought to be allowed an opportunity to prove that he can make atonement for this one error of his career."

It is stipulated that the answer should be deemed and treated as evidence, and that, if Tanner were called as a witness, he

would testify as therein stated. Upon the record as thus made, together with a copy of the testimony of Mr. Tanner as given on the trial of *United States v. Mitchell* in the federal court, the cause was submitted.

The proceeding is instituted under Sections 1066 and 1067, B. & C. Comp. By Section 1066 it is provided that an attorney shall be disbarred by this court upon proper proceedings for that purpose whenever it shall be made to appear to the court "that, if he were then applying for admission to the bar his application should be denied because of unprofessional conduct." and Section 1067 reads:

"An attorney may be removed or suspended by the Supreme Court for either of the following causes, arising after his admission to practice: 1. Upon his being convicted of a felony or of a misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence;
* *"

The interpretation of Section 1066 is involved in doubt. It provides that an attorney shall be disbarred when it is made to appear that, if he were applying for admission, his application should be denied because of "unprofessional conduct." How one who has never been admitted to the bar or practiced as an attorney can be guilty of "unprofessional conduct" is not clear. But, assuming that the statute means, as it probably does, that an attorney shall be disbarred when it appears that his general moral character or unfitness is such that, if he were applying for admission, his application would be denied, there is no showing here why the statute should be invoked in this case. The record discloses, and it is admitted, that Mr. Tanner has been a member of the bar of this court for 25 years, and that his personal character and professional standing and integrity have never been impugned in any way until the transaction upon which this proceeding is based.

1. It is very questionable whether a mere plea or verdict of guilty is a conviction within the meaning of Section 1067. In common parlance and for many purposes the word "conviction,"

when used in a statute, means the judicial ascertainment of guilt by plea or verdict: *Ex parte Brown*, 68 Cal. 176 (8 Pac. 829); *Commonwealth v. Lockwood*, 109 Mass. 323 (12 Am. Rep. 699). But when a conviction is made the ground of some disability or special penalty there are many respectable authorities holding that a final adjudication by judgment is essential: *Faunce v. People*, 51 Ill. 311; *Commonwealth v. Gorham*, 99 Mass. 420; *State v. Townley*, 147 Mo. 205 (48 S. W. 833); *Blaufus v. People*, 69 N. Y. 107 (25 Am. Rep. 148); *Smith v. Commonwealth*, 14 Serg. & R. 69; *Commonwealth v. Miller*, 6 Pa. Super. Ct. 35. It is unnecessary, however, to decide the question at this time. The defendant by his answer waives all technical defenses, freely admits his guilt, and makes a full and complete statement of the facts, and it only remains for the court to ascertain the judgment which should be rendered thereon.

2. We need not comment on the facts. They speak for themselves. There are circumstances which call for the exercise of clemency, but that does not justify the offense. The crime with which the defendant is charged, and the commission of which he admits, was a serious one, deliberately and intentionally committed, and the court would be unmindful of the duty it owes to itself, to the profession and to the public, if it allowed it to go unrebuked. Proceedings for the disbarment of an attorney, however, are not for the purpose of punishing him for the commission of a crime. That matter is left to the criminal courts. The objects of the proceedings here are to uphold the dignity and purity of the profession, protect the courts, preserve the administration of justice and protect clients, and it is believed that it is not necessary, in order to accomplish these purposes, that the defendant should be permanently disbarred, but he will be suspended for a period of 90 days.

Judgment accordingly.

SUSPENDED.

Argued 4 October, decided 30 October, 1906.

OVERBECK v. ROBERTS.

87 Pac. 153.

PLEADING—AIDED BY VERDICT.

1. A technical objection that a complaint was not sufficiently explicit in its details of fact and contained some conclusions, will not be entertained after verdict, even though the point was urged on demurrer, where it is evident that the defendant was not at all misled.

For example: In an action by a broker against a customer to recover an amount due on a sale and purchase of cotton on a cotton exchange, the complaint alleged the sale and purchase of a certain number of bales of cotton at a specified price per pound, and the complaint and answer contained allegations involving an assumption that a bale of cotton weighed 500 pounds. *Held*, that a contention that the complaint was insufficient because the number of pounds in a bale or the aggregate number of pounds bought or sold or the price per bale was not stated was too late after verdict for plaintiff, notwithstanding a demurrer on that ground was interposed and overruled.

TELEGRAMS AS DOCUMENTARY EVIDENCE.

2. In an action by a broker against a customer to recover an amount due on a sale and purchase for defendant on an exchange, telegrams sent by plaintiff to its agents at the place of the exchange, directing such sales and purchases, are competent to show that an actual and *bona fide* sale and purchase was contemplated, the telegrams being the original memoranda made at the time.

STOCK GAMBLING—BURDEN OF PROOF.

3. In an action by a broker against a customer to recover an amount due plaintiff on transactions conducted by the broker for defendant on stock exchanges, the burden of proving that the transactions were a mere cover for differences is on defendant.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by Overbeck, Starr & Cooke Co., a corporation, to recover from J. C. Roberts a balance on the sale and purchase of cotton. The complaint alleges that the plaintiff is a corporation engaged in the business of a commission merchant and stock broker in the City of Portland; that on January 15, 1904, at defendant's instance and request and by his order, it sold on the New York Cotton Exchange, through its eastern correspondent, 100 bales of July cotton (the term "July cotton" meaning merchantable cotton to be delivered in July, 1904), at \$0.1399 per pound; that plaintiff thereby, at defendant's re-

quest and for his benefit and advantage, became liable to furnish and deliver at New York in the month of July, 1904, 100 bales of merchantable cotton for the agreed price of \$0.1399 per pound, amounting to \$6,995; that plaintiff was to receive \$10 commission as brokerage on such sale, and defendant was to bear all loss that might accrue on account thereof if cotton should rise in value and receive all profits that might accrue if cotton should decrease in value; that on February 1, 1904, cotton had advanced to \$0.1742 per pound, and on that day defendant ordered and directed plaintiff to purchase at the market price 100 bales of cotton for July delivery to cover the sale of January 15, 1904, and agreed and promised to pay plaintiff a commission of \$10 on such purchase; that in accordance with the order and direction of defendant, plaintiff purchased on February 1, 1904, 100 bales of July cotton at \$0.1742, the market price, per pound, to cover the January sale; that by reason of the sale of January 15, 1904, and the purchase of February 1, 1904, the defendant became indebted to plaintiff in the sum of \$1,735; that no part of the same has been paid except \$263.75, and there is now due, owing and payable to plaintiff from the defendant the sum of \$1,471.25. For a further and separate cause of action it is alleged that on September 23, 1903, plaintiff purchased for defendant on the New York Stock Exchange 25 shares of the common stock of the United States Steel Corporation at \$17.50 per share, amounting to \$437.50, defendant agreeing to pay 6 per cent interest on such amount and deposited with plaintiff \$75 as margin against losses on such purchase; that on December 30, 1903, at defendant's request, plaintiff sold such stock for \$12.50 a share, receiving \$312.50 therefor; that defendant agreed to pay plaintiff a brokerage of one-fourth of 1 per cent on the amount of such purchase and sale and whatever loss might accrue by reason of the same; that defendant thereby became indebted to plaintiff in the sum of \$67.95, less \$12.50, dividend received on such stock by it and passed to defendant's credit.

A demurrer to the complaint because it did not state facts

sufficient to constitute a cause of action was overruled. The defendant answered denying all the material allegations of the complaint, and for a further defense alleged that on January 18, 1904, the plaintiff notified defendant that it had sold 100 bales of cotton for his account on the New York Cotton Exchange for July delivery at \$0.1399 per pound; that such sale was made without defendant's authority, and he refused to ratify the same unless plaintiff would agree to carry the trade until closed out by the mutual consent of both parties, which plaintiff promised and agreed to do; that thereafter and on February 1, 1904, defendant, on the advice of the plaintiff and for the purpose of protecting such sale, instructed plaintiff to purchase for him 100 bales of July cotton at the market price, placing a stop loss thereon of \$1 per bale; that on February 18, 1904, cotton had advanced to \$0.1387, and defendant directed plaintiff to close the deal of January 15, but plaintiff claimed to have closed such deal on February 1 at \$0.1399, whereby defendant lost the sum of \$60 as profits, less \$20 commission; that defendant had demanded of the plaintiff the sum of \$40, but it had refused and still refuses to pay the same. For a further and separate defense, and by way of counterclaim to the second cause of action, it is alleged that defendant had advanced to the plaintiff from time to time various sums of money, and there is now a balance due defendant from plaintiff over and above the sum of \$55.45, due plaintiff, of \$89.30. A reply put in issue the new matter alleged in the answer and a trial was had by the consent of both parties before the court without the intervention of a jury. After hearing the evidence the court made findings of fact and conclusions of law in favor of the plaintiff and entered judgment accordingly. From this judgment the defendant appeals, contending (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in admitting in evidence certain telegrams which passed between the plaintiff and its correspondent in Chicago, concerning the transactions referred to in the complaint; (3) that the court erred in overruling a

motion for nonsuit; and (4) that the findings of fact and conclusions of law are not supported by the testimony, and are not separately stated.

AFFIRMED.

For appellant there was a brief over the name of *Cake & Cake*, with an oral argument by *Mr. Harry Marion Cake*.

For respondent there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The contention that the complaint does not state facts sufficient to constitute a cause of action, because the number of pounds of cotton in a bale, or the aggregate number of pounds bought or sold by the plaintiff on defendant's account, or the price per bale, is not stated, comes too late after verdict. The pleadings are framed, and the trial evidently proceeded, on the assumption that a bale of cotton on the exchange and in the market contains 500 pounds. The complaint avers that 100 bales at so much per pound amounted to a certain sum and the answer contains substantially a similar averment. It is alleged in the answer that by plaintiff's closing out the transaction on February 1, 1904, instead of on the 18th of that month, the defendant lost the difference between \$0.1399 and \$0.1387 per pound on 100 bales, to wit, \$60—a result which could be obtained only by assuming that a bale of cotton contains 500 pounds. In addition to this, a statement of account was rendered to the defendant by the plaintiff in which the transaction between the parties was set out in a similar manner.

2. The telegrams offered and admitted in evidence were competent as tending to show that the transaction between plaintiff and defendant contemplated an actual and *bona fide* sale and purchase of cotton and was not a mere dealing in differences. The plaintiff had a leased wire from Chicago to its office in Portland, by means of which the telegrams were sent direct to its agent and memoranda made of them. When the plaintiff received the order of January 15, 1904, from defendant, to sell

100 bales of July cotton, it immediately wired to its agents, Logan & Bryan, who had offices in Chicago and New York: "Sell 100 July cotton," and when it received the order to buy on February 1, it wired them: "Buy 100 July cotton market." The telegrams offered were the original memoranda made at the time, and were competent evidence for the purpose stated.

3. A contention is made that the pleadings and evidence show that the transactions between plaintiff and defendant were merely dealings in futures or a gambling in differences, and that no actual purchase or sale of a commodity was contemplated, but the understanding was that a settlement was to be made on the differences in the market quotations from day to day until the deal was closed, and therefore the transaction was illegal and void, and will not be enforced by the courts. No such facts are pleaded in the answer, nor was any request made for findings to that effect. The answer and requested findings assume and state that a sale of cotton was made by plaintiff on defendant's account "on the New York Cotton Exchange," and the evidence is all to the effect that the transaction was actual and *bona fide*. The witnesses for the plaintiff, and there was no contradiction of them, testify that the transactions between plaintiff and defendant were actual and *bona fide* sales of cotton on the New York Cotton Exchange; that plaintiff had a private wire from its office in Portland to its agents in Chicago, and, when an order was given it to sell or buy, it telegraphed the order to them and they executed it on the exchange, and the price of the execution was wired back to the plaintiff. It therefore appears that the purchase and sale made by the plaintiff on defendant's account was an actual and *bona fide* transaction on the New York Cotton Exchange and presumably in accordance with its rules and regulations. Such transactions have been uniformly held valid and legal on their face, and not mere wagering contracts or dealing in differences, and the burden of proving that they are invalid, as a mere cover for differences, is on the party who makes the assertion, and defendant offered no evidence on that subject: *Chicago Board of Trade v. Christie G. & S. Co.*

198 U. S. 236 (25 Sup. Ct. 637; 49 L. Ed. 1031); *Clews v. Jamieson*, 182 U. S. 461 (21 Sup. Ct. 845; 45 L. Ed. 1183); *Bangs v. Hornick* (C. C.), 30 Fed. 97; *Henning v. Boyle* (C. C.), 112 Fed. 397. We are of the opinion that, under the facts of this case, the court could not declare the transaction to be illegal and void.

4. The contention that the findings of fact are insufficient because the weight of the bales of cotton alleged to have been bought and sold by plaintiff on defendant's account, either singly or in the aggregate, is not given, is disposed of by what has already been said about the sufficiency of the complaint. There is no difficulty, as we read the findings, in ascertaining from them what the findings of fact were or the conclusions of law which the court drew from such facts, and this is all the statute requires when it provides that the findings of fact and conclusions of law shall be separately stated: *Weissman v. Russell*, 10 Or. 73.

There was no dispute as to the second cause of action, and plaintiff was not required to prove it. The complaint sets out the facts constituting the cause of action and alleges a balance due it thereon of \$55.45; the answer pleads, as a counterclaim thereto, that there is a balance of \$89.30 in plaintiff's hands, of money advanced by defendant "over and above the sum of \$55.45, due and owing to the plaintiff," for which judgment is demanded, and when plaintiff commenced to offer evidence in support of its cause of action the defendant's counsel stated: "We do not dispute that."

There is no error in the record, and the judgment is affirmed.

AFFIRMED.

Argued 17 January, decided 29 January, 1907.

SEARS v. MULTNOMAH COUNTY.

88 Pac. 522.

STATUTES—EMERGENCY CLAUSE—CONSTRUCTION OF REFERENDUM AMENDMENT TO STATE CONSTITUTION.

The initiative and referendum amendment of 1902 to Section 1 of Article IV of the Constitution of Oregon, reserving to the people the right to reject any act of the legislature, "except as to laws necessary for the

immediate preservation of the public peace, health or safety," must be read in connection with and as a part of Section 28 of the same article, providing that no act shall take effect until ninety days from the end of the session at which it was passed, except in case of an emergency, which must be declared in the act, the effect of which is that only those acts can immediately go into effect that are declared by the legislature in the act itself to be necessary for the immediate preservation of the public peace, health or safety.

The act of 1903, granting to a certain class of circuit judges an increased salary, passed with an emergency clause reciting that whereas the compensation of certain judges was inadequate an emergency was declared, and the act should take effect on its approval (Laws Sp. Sess. 1903, p. 14—, § 2), did not take effect on its approval by the governor, since the emergency clause did not declare the act to be necessary for the immediate preservation of the public peace, health or safety, as required by the constitutional amendment of 1902.

From Multnomah: THOMAS A. McBRIDE, Judge.

Statement by MR. JUSTICE EAKIN.

This is an action brought by Alfred F. Sears, Jr., against Multnomah County to recover an amount of salary as circuit judge, claimed to be due from December 24, 1903, to January 31, 1904, under Section 2926 of B. & C. Comp., as amended December 24, 1903 (Laws Sp. Sess. 1903, p. 14), granting to certain circuit judges \$1,000 per annum additional salary to be paid by the county, this being salary for part of the time prior to the expiration of 90 days after the adjournment of the legislature. Appellant is contesting the payment thereof for the reason that the act providing for the salary contains no sufficient emergency clause to become effective from the date of its approval. A demurrer to this complaint was filed and overruled by the court, and judgment rendered for the respondent for want of an answer, from which judgment this appeal is taken.

The case was submitted on briefs under the proviso of Rule 16: 36 Or. 587, 600.

REVERSED.

For appellant there was a brief over the name of *Williams, Wood & Linthicum*.

For respondent there was a brief over the name of *Charles Henry Carey*.

MR. JUSTICE EAKIN delivered the opinion of the court.

There is practically but one question involved here. That is

whether the emergency clause in the amendment of Section 2926, B. & C. Comp., approved December 24, 1903 (Sp. Laws 1903, p. 14), is such as to render the law effective from that date. The emergency clause of that act reads as follows, viz.:

"Whereas, the compensation of judges in judicial districts composed of one county only, is, under the present law, inadequate, an emergency is declared, and this act shall take effect upon its approval by the Governor."

This emergency clause in the amendment of Section 2926 was evidently intended as a compliance with the requirements of Section 28 of Article IV of the constitution, and is sufficient under that section if it is not affected by the amendment of Section 1 of that article, adopted June 2, 1902, which provides, among other things:

"The people reserve to themselves * * power at their own option to approve or reject at the polls any act of the legislative assembly. * * The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety), either by petition, etc.

"Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly."

This court, in *Kadderly v. Portland*, 44 Or. 118, 147 (74 Pac. 720), in speaking of the exception made in the amendment of Section 1 of Article IV of the constitution, namely, laws "necessary for the immediate preservation of the public peace, health or safety," say that the legislature might put them in operation through an emergency clause as provided by Section 28 of Article IV of the constitution or allow them to become laws without an emergency clause, the necessity or expediency of either course being matter for its exclusive determination, but "as to all other laws the amendment applies, and they cannot be made to go into operation for 90 days after the adjournment of the session at which they were adopted, or until after approval by the people, if the referendum is invoked." Counsel for respondent claims that the decision of this point was not an

essential one in the Kadderly Case, questions its correctness, and seeks to have it re-examined by the court at this time.

It is claimed by the appellant that the emergency clause that will authorize an act to take effect upon its approval must be such an emergency as comes within the exception contained in the amendment of said Section 1 above quoted. Respondent claims that this amendment of Section 1 does not affect Section 28 of Article IV, and that the legislature may still give immediate effect to any act, by the terms of Section 28, to which it applied previous to the amendment of Section 1. We think that to put such a construction upon the amendment of Section 1 would violate its true purpose and intent. Respondent relies upon *State v. Bacon*, 14 S. D. 403 (85 N. W. 605), which, in passing upon a similar constitutional provision, holds, in effect, that the amendment of Section 1 of Article IV should have read into it Section 28 of that article, viz., that the exception in that amendment of 1902 of Section 1 of Article IV should be interpreted as though it read: "Except as to laws necessary for the immediate preservation of the public peace, health or safety, and except also such laws as are passed with an emergency clause as provided in Section 28." We cannot give our consent to this construction of the amendment, but rather hold that the exception in the amendment should be read into Section 28 of Article IV. Otherwise the reservation in the amendment that "the people reserve power at their own option to approve or reject at the polls any act of the legislative assembly" would be rendered futile. Thus, instead of leaning "in favor of that construction which will render every word operative," as suggested in the case of *State v. Bacon*, the effect would be to make the amendment idle and nugatory. We believe the amendment makes its own exceptions, and, if those conflict with Section 28 of Article IV, they will constitute a limitation upon it to that extent.

That an act may take effect under a general emergency clause, and yet be subject to the referendum, is clearly contrary to the intent of the amendment, and would produce disastrous results. The clause in the amendment which reads,

"Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise,"

clearly means that a law upon which the referendum is invoked cannot take effect prior to its approval by the vote; and consequently no act that is subject to the referendum can be made to go into operation for 90 days after the adjournment of the session or its approval by vote.

Therefore we conclude that if the act comes within the amendment of Section 1 of Article IV of the constitution, and the legislature desires to have it take effect upon its approval, it must so declare, and set it forth in the preamble or body of the act, and, as the emergency clause contained in this act does not pretend to bring it within the exception of the amendment of Section 1 of Article IV, it cannot operate to give it immediate effect, and therefore it became effective 90 days from the approval thereof by the Governor, and the demurrer to the complaint should have been sustained.

It follows from these considerations that the judgment should be reversed, and it is so ordered.

REVERSED.

Argued 15 January, decided 29 January, 1907.

STATE v. THOMPSON.

88 Pac. 583.

HOMICIDE—ADMISSIBILITY OF DYING DECLARATIONS.

1. Where a statement as to the circumstances of an affray was made by the injured person after being told by his physician that he could not recover unless by a rare chance after a surgical operation, and within a few minutes the person died from the wounds received, the statement is admissible as a dying declaration made under a realization of impending death, although he agreed to submit to the operation.

SELF DEFENSE—EVIDENCE OF DESPERATE CHARACTER OF DECEASED.*

2. On a trial for homicide defended on the ground of self defense, proof that decedent was a violent and dangerous man, is competent.

*NOTE.—The subject of the admissibility of evidence of threats, which, as stated in this opinion, is substantially the same as the admissibility of evidence of violent and dangerous disposition, is extensively considered in notes to *State v. Tolle*, 3 L. R. A. (N. S.) 523-527 and *Commonwealth v. Tircinski*, 4 A. & E. Ann. Cas. 388-339; 2 L. R. A. (N. S.) 102-104.

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whether the same was known to accused or not, to aid the jury in determining who was the aggressor in the difficulty resulting in the homicide, and the probable nature of the assault made by decedent on accused, if an assault was made; and such evidence should not be limited to the single question, who commenced the affray.

From Gilliam: WILLIAM L. BRADSHAW, Judge.

Joseph Thompson was convicted of murder in the second degree, and appeals. REVERSED.

For appellant there was a brief over the names of *Bowerman & Snover* and *Huntington & Wilson*, with an oral argument by *Mr. Hollis S. Wilson*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, and *Frank Menefee*, District Attorney, with an oral argument by *Mr. Menefee*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The defendant was indicted, tried and convicted of murder in the second degree for the killing of one Alex Goericke by stabbing him with a knife, and appeals, assigning as error the admission in evidence of the dying declaration of Goericke, and an instruction that evidence that Goericke was a dangerous and desperate man was admitted only as bearing on the question of who was the aggressor in the affray resulting in his death. The killing is admitted, but defendant claims and offered evidence tending to show that he was assaulted by the deceased, who was a dangerous and quarrelsome man, with a butcher knife, and that he acted in his own lawful self-defense and to save his own life. The difficulty occurred about noon on the 29th of December, 1904. A physician was summoned to attend the deceased, and arrived at the place of the affray sometime between 4 and 5 o'clock in the afternoon. He found the deceased suffering from a wound in the abdomen through which the muscles were protruding and directed that he be taken to Condon, a distance of 10 or 12 miles, for treatment, where he arrived about 11 or 12 o'clock at night, as the surgeon says, in practically a dying condition. After examining his wounds, the surgeon told him that he thought his case hopeless, that his only chance laid in an

operation, and inquired if he was willing to take it, and he replied that he was. He was told by the surgeon that he would probably not come out from under the influence of the anæsthetic, and was asked if he desired to make a statement, to which he replied in the affirmative. His statement was then taken down in writing and signed by him. He died 15 or 20 minutes later while the anæsthetic was being administered. There was no evidence from any declarations of the deceased or otherwise that he had any hope of recovery at the time he made the statement. To all inquiries upon that subject he replied: "I don't know; the doctor may know," or "the doctor can tell you." Under these circumstances we think the dying declaration was properly admitted in evidence: *State v. Fletcher*, 24 Or. 295 (33 Pac. 575); *State v. Gray*, 43 Or. 446 (74 Pac. 927). The deceased was suffering at the time from a mortal wound from which he died a few minutes later. His physician had advised him that his case was hopeless, and that he would probably die under the anæsthetic which was about to be administered. It was with this knowledge that the statement was made, and it was manifestly under a sense of impending death, and when he had no hope or expectation of recovery. The fact that he was willing to take the only chance held out to him by the surgeon does not indicate that he expected to recover.

2. But the court was in error in limiting the effect of the evidence of the dangerous and desperate character of the deceased to the single question as to who was the assailant or the aggressor in the difficulty which resulted in his death. There was evidence, as the bill of exceptions states, tending to show that the defendant acted in self-defense, and in such case proof that the deceased was a violent and dangerous man is competent, whether known to the defendant or not, for the purpose of aiding the jury in determining who was in fact the aggressor, and the nature and character of the assault, if one was made by the deceased. For, as said by Mr. Wigmore: "One's persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased's

action": 1 Wigmore, Evidence, § 63. To prove the dangerous and desperate character of a deceased, of course, does not tend to prove the commission of an unlawful act by him, but it does increase the probability of the other evidence tending to show that he commenced the affray, and that his attack was felonious and intended to do the defendant great bodily harm. The claim that the defendant acted in self-defense, if indicated by the other evidence, would be more readily believed concerning a violent and dangerous man than a peaceable and quiet one, and any mind searching for the truth and in doubt would naturally be affected by such evidence. The defendant's knowledge or want of knowledge of the deceased's character can have nothing to do with its value as evidence for the purpose stated. Its object was to render more probable the other evidence in the case which tended to show that the deceased was the aggressor, and that the nature of his attack was such as to justify the defendant in resorting to violence to repel it or to save his own life, and is not affected in the slightest by the defendant's previous knowledge. Its value comes from the fact that the deceased was one who was apt or likely to do what is imputed to him, and not from the defendant's knowledge of such fact. The rule in reference to the admissibility and use of evidence in a homicide case tending to show that the deceased was a desperate and dangerous man is practically the same as that regulating the admission of uncommunicated threats made by him, and in the latter case LORD, J., said: "Where the circumstances raise a question of self-defense, evidence of uncommunicated threats recently made are admissible for the purpose of showing the motive of the deceased, and the nature and character of the assault": *State v. Tarter*, 26 Or. 38 (37 Pac. 53). Proofs of threats, or that the deceased was a violent and dangerous man, are competent in a homicide case to show the probability of the acts charged against the deceased, whether known to the defendant or not. Where the threats have been communicated, or the desperate and dangerous character of the deceased is known to the defendant, such evidence may be used, not only

to show the probability of the acts imputed to the deceased, but also the defendant's apprehension of danger when he acted upon appearances not wholly justified by the facts: 1 Wigmore, Evidence, §§ 63, 110. Because the instruction as given limited the application of the evidence in question to the single matter as to who was the assailant, it was erroneous, and the error was not cured by any other instructions.

Judgment reversed, and new trial ordered. **REVERSED.**

Decided 29 January, 1907.

LEEDY v. WOOD.

88 Pac. 585.

BILLS AND NOTES—EXAMPLE OF AN ANSWER NOT SUFFICIENTLY STATING FAILURE OF CONSIDERATION.

An answer in an action on notes given for the price of a mining claim, which alleged that the claim had been located by a third person since deceased; that the makers desired to purchase the claim; that the payee represented that he was the owner and entitled to the possession thereof, and that he agreed to convey the same to the makers; that, when the representations were made, the makers found that the deed from the third person as recorded erroneously described the claim; that the payee represented that the deed executed to him by the third person correctly described the claim; and that the error resulted from an error committed in recording the deed, without alleging that the payee agreed to deliver to the makers the deed executed by the third person, or averring that the payee promised that he would have the deed re-recorded, was insufficient on demurrer for, if the third person's deed was not to be re-recorded, any representations made by the payee to the makers as to how the error in the description occurred, however false, were immaterial.

From Grant: **GEORGE E. DAVIS**, Judge.

Action on promissory notes, resulting in a judgment for plaintiff. The case was submitted on briefs, under the proviso of Rule 16: 35 Or. 587, 600. **AFFIRMED.**

For appellants there was a brief over the names of *W. G. Drowley* and *Errett Hicks*.

For respondent there was a brief over the name of *Cattanach & Wood*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is an action by A. D. Leedy against T. H. Wood and S. Taylor to recover on four promissory notes, executed by the defendants, June 22, 1905, to A. D. Leedy, trustee, each for the sum of \$50 and payable respectively September 1, 1905, November 1 of that year, January 1, 1906, and March 1 of the latter year, with interest after maturity at the rate of 10 per cent per annum, and containing a stipulation to pay a reasonable sum as attorney's fees in case action was instituted thereon. The complaint, containing four causes of action, averred that, prior to the commencement thereof, the notes mentioned were assigned to plaintiff, who is the owner and holder thereof, and demanded judgment for the amount due, and \$50 as attorney's fees. The answer denied the material allegations of the complaint, and, eliminating the parts that might have been stricken out on motion, averred, in effect, in each cause of action, that about August 31, 1885, one W. F. Smith, Sr., located on the unpatented mining ground of the United States a placer claim, described as follows: The S. $\frac{1}{2}$ of lot 2 in section 6, township 14 S., of range 32 E., in Grant County; that the defendants desired to purchase that claim and to "secure a full, complete, legal, possessory and record title thereto," and the plaintiff, knowing their wishes in this respect, represented to them that he was the sole owner of the premises; that he held such title thereto against all parties, except the United States, and was entitled to the possession of the claim, which the locator had conveyed to him, and which he would sell and convey to the defendants, invest them with the title which they desired, and place them in possession of the premises, in consideration of \$1,050, of which sum \$100 was to be paid down and the remainder in installments of \$50 each, the first payable September 1, 1905, and the others, respectively, every two months thereafter, the deferred payments to be evidenced by promissory notes; that at the time such representations were made, the defendants searched the public records of Grant County and found that the deed executed by Smith to Leedy described the

placer claim as situated in township 4 S.. instead of 14; that, plaintiff's attention having been called to such defect, he represented to the defendants that the error in this respect occurred in recording the instrument which, as executed, correctly described the premises; that, the defendants having demanded to see the original deed executed by Smith, the plaintiff further represented to them that it had been mislaid and could not be found; that the defendants, believing all such representations, relying thereon, and being induced thereby, accepted plaintiff's offer to sell and convey the claim, paid him the sum of money demanded, executed to him as trustee the promissory notes required, and received from him a quitclaim deed of the premises; that all such representations were false, and so known to be by the plaintiff when they were uttered, and were made with intent to deceive and defraud the defendants; that on June 22, 1905, when the plaintiff executed his deed to the defendants, he had no interest in the mining claim or color of title thereto, and never was entitled to the possession of the premises or authorized to sell or convey the same and never placed the defendants in possession of any part thereof; that about August 1, 1905, and prior to the maturity of any of the promissory notes mentioned, the defendants, having discovered that such representations were false, rescinded the contract and tendered to plaintiff a quitclaim deed of the premises; and that, in consequence of such false representations, the consideration for all the notes, including those sued on, has wholly failed. A demurrer to the new matter in the answer, on the ground, *inter alia*, that it did not state facts sufficient to constitute a defense, having been sustained, and the defendants declining further to plead, the cause was tried, and judgment rendered against them for the sums demanded, and they appeal.

The answer intimates that, after the plaintiff executed to the defendants a deed to the placer mining claim, the locator thereof, W. F. Smith, Sr., departed this life, but whether or not his death occurred prior or subsequent to the alleged rescission of the contract is not disclosed. In order, however, to make

the defendants' case as strong as possible, we shall assume that Smith died before they discovered the alleged falsity of the plaintiff's representations, and shall also take for granted that the deceased left no person surviving who was competent or qualified to execute a deed in his stead, so that the only manner in which the defendants could have secured "a full, complete, legal, possessory and record title," as they desired, was by having the deed which was executed to the plaintiff re-recorded. The answer admits that at the time such representations were made, the defendants discovered the defect in the deed as recorded, respecting the description of the premises, and that, having called the plaintiff's attention thereto, he represented to them that the deed executed to him by Smith correctly described the claim, and that the imperfection mentioned resulted from an error committed in recording the instrument. It is, therefore, fairly to be inferred from the averments of the answer that the defendants reasonably expected that the error, in the respect mentioned, would be corrected by having the deed re-recorded. The answer does not allege that the plaintiff agreed to deliver to the defendants the deed which he secured from Smith, so that they could have it spread on the records, or aver that plaintiff promised them that he would have the instrument re-recorded. The defendants knew when they secured from plaintiff a conveyance of his interest in the mining claim that the deed executed by Smith to him, as evidenced by the public record, did not correctly describe the premises. If the locator's deed was not to be re-recorded, any representations made by the plaintiff to the defendants, as to how the error in the description occurred, however false they may have been, were wholly immaterial. The manner suggested is the only way in which the defendants could have secured the title to the placer mine that they claim the plaintiff represented that he held and that he also stipulated to give them, and, as they did not allege that he agreed to deliver to them the Smith deed, or promise to have it re-recorded, the answer fails to state facts sufficient to constitute a defense, and,

this being so, no error was committed in sustaining the demurrer interposed to that pleading.

It follows from these considerations that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Argued 17 October, decided 21 November, 1906.

MURPHY v. SALEM.

87 Pac. 532.

ERROR IN PRINTING OREGON CONSTITUTION.

1. In printing the Constitution of Oregon in the Bellinger & Cotton compilation of laws, the word "subject." in Art. IV, § 20, line 2, on page 41, has been made plural instead of singular as it appears in the original enrolled copy of the constitution.

STATUTES—TITLE—PLURALITY OF SUBJECTS.

2. Sp. Laws 1903, p. 337, was entitled, "An act to amend" certain specified sections "of an act entitled 'An act to incorporate the City of Salem,' and to repeal an act entitled 'An act to incorporate the City of Salem,' approved October 15, 1862, and an act entitled 'An act to incorporate the City of Salem,' approved February 15, 1893, and to repeal all acts and parts of acts in conflict therewith," approved February 17, 1899, and to amend," certain specified subdivisions of such "act as amended by" certain other sections "of an act entitled 'An act to amend [certain sections] of the * * act,' approved February 15, 1901." Section 1 of the act of 1903 amended the act incorporating the City of Salem by extending the territorial limits thereof so as to include plaintiff's land. *Held*, that the act of 1903 was not in violation of Const. Or. Art. IV, § 20, requiring that every act shall embrace but one subject, which shall be clearly expressed in its title, etc.

TITLES OF AMENDATORY ACTS.

3. The title to an amendatory act is sufficient if it refers to the particular section it is intended to alter, and it will not violate Const. Or. Art. IV, § 20, requiring that every act shall embrace but one subject, which shall be expressed in its title, unless the provisions of the amendment are such as could not have been included in the original act as matters properly connected therewith.

TITLE OF AMENDATORY ACT—EFFECT OF SLIGHT ERROR—CONSTRUCTION.

4. A slight immaterial error in the title of a legislative act, one that evidently did not mislead or deceive any intelligent person, ought not to be considered as affecting the validity of such act.

Sp. Laws 1899, p. 921, was entitled "An act to incorporate the City of Salem," and to repeal an act entitled "An act to incorporate the City of Salem," approved October —, 1862, etc., and to repeal all acts and parts of acts in conflict "herewith." Special Laws 1903, p. 337, amending the former act, in purporting to set out its title introduced the number "15" in the space between the word "October" and the number "1862" and changed the word "herewith" to "therewith." *Held*, that the insertion of such number and the substitution of the word were not such defects as should defeat the amendment.

MUNICIPAL CORPORATIONS—INCORPORATION ACT—ALTERATION—POWERS OF TAXATION—CREDIT.

5. Laws 1903, p. 337, § 23, amending the act incorporating Salem, provides that the common council shall not create any debt or liability, provided that at the end of each year an estimate shall be made of the actual revenues to be derived from all sources, and from the total of that estimate the total of fixed charges shall be deducted, and the disbursements of the city council shall be restricted to the balance; that no debt shall be contracted in excess of the estimated revenues, except in case of an emergency, etc., and that the indebtedness of the city shall not exceed \$20,000, except as provided by Section 6, which authorizes the contracting of indebtedness for the purpose of obtaining control of public utilities. Held, that such act is not in violation of Const. Or. Art. XI, § 5, providing that acts for the incorporation of cities and towns shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit, for evidently there is a restriction provided here that seemed sufficient to the legislature.

From Marion: WILLIAM GALLOWAY, Judge.

Suit by J. E. Murphy against the City of Salem. From a judgment in favor of defendant, plaintiff appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. William Henry Holmes* and *Mr. Myron Edwin Pogue*.

For respondents there was a brief over the names of *Tilmon Ford*, *W. T. Slater*, *W. M. Kaiser* and *John H. McNary*, with oral arguments by *Mr. Ford* and *Mr. McNary*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit by J. E. Murphy against Charles Lembcke, John W. Roland and W. J. Culver, as assessor, clerk and sheriff, respectively, of Marion County, and also against the City of Salem, to enjoin the assessment of plaintiff's real property and the levy thereon or the collection therefrom of any municipal tax, and involves the constitutionality of an act of the legislative assembly (Sp. Laws 1903, p. 337), attempting to amend the charter of that city so as to include within its boundaries plaintiff's premises, containing about 23 acres of farm land and having thereon a dwelling house, barn, outbuildings and a tile factory. The cause was tried on an agreed statement of facts, resulting in a decree dismissing the suit, and plaintiff appeals.

It is maintained by his counsel that the title of the act re-

ferred to contravenes Section 20 of Article IV of the organic law of the state, in that it is insufficient to support the provisions of the attempted enactment. The act complained of is entitled as follows:

"An act to amend Sections two (2), five (5), six (6), eight (8), ten (10), fifteen (15), twenty-three (23), twenty-five (25) and seventy-four (74), of an act entitled 'An act to incorporate the City of Salem, and to repeal an act entitled An act to incorporate the City of Salem, approved October 15, 1862, and an act entitled An act to incorporate the City of Salem, approved February 15, 1893, and to repeal all acts and parts of acts in conflict therewith,' approved February 17, 1899; and to amend subdivisions nine (9) and fourteen (14) of Section six (6) and Sections five (5), fifteen (15), twenty-five (25) and seventy-four (74) of said act as amended by Sections one (1), two (2), three (3), four (4), five (5) and ten (10) of an act entitled 'An act to amend Section five (5), subdivisions nine (9) and fourteen (14) of Section six (6), and Sections fifteen (15), twenty-five (25), twenty-seven (27), thirty-one (31), forty-seven (47), sixty-one (61) and seventy-four (74) of the aforesaid act,' approved February 15, 1901."

The clause of the fundamental law so claimed to have been infringed is published as follows:

"Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title": Const. Or. Art. IV, § 20 (B. & C. Comp. p. 41).

The act under consideration, so far as deemed material, is as follows:

"Section 1. That Section two (2) of the said act incorporating the said City of Salem, Oregon, be amended so as to read as follows:

'Sec. 2. The limits of the said city shall be as follows,'—setting out the boundaries of the city as given in the act of February 17, 1899: Laws 1899, p. 921.

Provided, that on and after the first day of October, 1903, the limits of said city shall be as follows"—particularly describ-

ing the boundaries so as to include, with other premises, plaintiff's land.

1. It is stated in the brief of plaintiff's counsel that the framers of the constitution, in the clause thereof hereinbefore quoted, having selected the word "subjects," which must be expressed in the title of an act, the plural form thus adopted necessitated a declaration in the title in question that the act incorporating the City of Salem was not only to be amended, but that the boundaries of the municipality were also to be enlarged. A very ingenious argument, founded on the use of the word "subjects" was rendered ineffectual at the trial by an examination of the enrolled copy of the constitution which discloses that the singular form only of that word is there used, and that a mistake has been made in publishing this clause of the organic law. It will be remembered that the author of the act now under consideration in framing the bill set out in Section 2 thereof the entire section of the same number as it then existed (Laws 1899, p. 921), and also displayed the section as it was to be amended. The degree of care manifested in thus presenting the original section and the proposed amendment in the bill evinces an abundance of caution that is not usually exercised in preparing measures for enactment.

2. In *Montgomery v. State*, 107 Ala. 372 (18 South. 157), in construing clauses of a constitution which provided that "each law shall contain but one subject which shall be clearly expressed in the title," and also required an amended law to be "re-enacted and published at length," it was held that setting out in an act as altered, without reciting the old law as it stood before the amendment, was a sufficient compliance with the requirements of the fundamental law. The manner of stating the amendment of the boundaries, set out in the act of February 7, 1903, is not material to a decision herein, and is mentioned only because of a criticism thereof in plaintiff's briefs. Unusual care seems to have been exercised in this respect, and as the organic law declares that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended

shall be set forth and published at full length" (Const. Or. Art. IV, § 22), the amendment strictly complies with this requirement.

3. The title of an amendatory act is sufficient if it refers to the particular section it is intended to alter and is not violative of Article IV, Section 20, of the fundamental law of the state, unless the provisions of the amendment are such as could not have been included in the original act as matters properly connected therewith: *David v. Portland Water Committee*, 14 Or. 98 (12 Pac. 174); *State v. Phenline*, 16 Or. 107 (17 Pac. 572); *Ex parte Howe*, 26 Or. 181 (37 Pac. 536); *State v. Robinson*, 32 Or. 43 (48 Pac. 357). Any amendment that introduces new subject-matter into an act is not germane thereto, and could not have been included in the original statute: 14 Am. & Eng. Enc. Law (2 ed.), 1004, note 4; 20 Cyc. 1187, note 97. Thus, under a constitution which provided that "each law shall contain but one subject which shall be clearly expressed in the title," an act regulating the trial of misdemeanors cannot, by a mere reference to the title, be amended so as to provide for the trial of felonies: *Harper v. State*, 109 Ala. 28 (19 South. 857). So, too, an act regulating the taking and catching of fish in inland lakes, cannot be amended, unless the title is disclosed, so as to include other waters than such lakes: *Fish v. Stockdale*, 111 Mich. 46 (69 N. W. 92).

4. Before resorting to this rule, to determine whether or not the amendment complained of in Section 2 of the act of February 17, 1903, introduces new subject-matter into the original act, it becomes necessary to consider the title of the amendatory statute. The title of the act attempted to be amended is as follows:

"An act to incorporate the City of Salem, and to repeal an act entitled 'An act to incorporate the City of Salem,' approved October, 1862, and an act entitled 'An act to incorporate the City of Salem,' approved February 15, 1893, and to repeal all acts and parts of acts in conflict herewith": Laws 1899, p. 921.

A comparison of this title with that of the amendatory act (Sp. Laws 1903, p. 337), as hereinbefore set out, will show that

the latter title, in purporting to detail the former, introduces the number "15" in the space between the word "October," and the number "1862," and also changes the last word quoted from "herewith" to "therewith." It is contended by plaintiff's counsel in argument that the substitution of the latter word for the former was such an error as to defeat the amendment. Statutes, like all other writings, are not to be overthrown on account of errors, mistakes or omissions therein, if the intention of the legislative assembly can be collected from the entire language used: *Endlich*, Interpret. Stat. § 302; *Sutherland*, Stat. Const. § 260; *State v. Robinson*, 32 Or. 43 (48 Pac. 357); *School Directors v. School Directors*, 73 Ill. 249. We think the very slight error in the title of the amendatory act is immaterial, and that the members of the legislature could not possibly have been misled or deceived in any manner thereby. Section 2 of the original act treats only of the boundaries of Salem, and the amendment, though enlarging the municipal territory, relates exclusively to the limits of the city, and is therefore germane to the original act, and does not introduce any new matter therein: *State v. Shaw*, 22 Or. 287 (29 Pac. 1028); *State v. Linn County*, 25 Or. 503 (36 Pac. 297); *Simon v. Northup*, 27 Or. 487 (40 Pac. 560: 30 L. R. A. 171). The amendment does not, in our opinion, violate the spirit or letter of Sections 20 or 22 of Article IV of the state constitution.

5. It is insisted by plaintiff's counsel that Section 23 and subdivision 6 of Section 6 of the amended act trench upon the following clause of the fundamental law of the state:

"Acts of legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit": Const. Or. Art. XI, § 5.

The provisions of the amendatory act thus challenged are, so far as deemed necessary to a decision here, as follows:

"Sec. 23. The common council shall not in any manner create any debt or liability; provided, that at the end of each year an estimate shall be made of the actual revenues to be derived from all sources, and from the total of that estimate the total of fixed charges shall be deducted, and the disbursements

of the city council shall be restricted to the balance. No debt shall be contracted in excess of the estimated revenue, except in the case of an emergency or unforeseen calamity, or except as otherwise provided therein; the council may call an election to determine whether the city shall incur an indebtedness to meet such an emergency or calamity or the acquisition of a public utility; and upon two-thirds of those persons who are qualified voters of, and who pay taxes on property within, said city voting at said election being in favor of authorizing the council to incur the proposed indebtedness, they may then contract the same; but said indebtedness shall not exceed the sum of \$20,000, except as provided in subdivision six (6) of Section six (6) of this charter. * *"

The material parts of the clause of the section thus referred to are as follows:

"6. The common council may have power to contract for water and light for city purposes, or to lease, purchase or construct a plant or plants for water or light, or both, for city purposes, in or outside the city limits. The council of the City of Salem shall, at all times, under the limitations herein set out, have power to provide, by ordinance, for lighting the streets, and all public and private places in the city, and furnishing water to the inhabitants thereof; to provide for the acquisition, ownership, construction and maintenance of waterworks, gas works, electric light works, steam, water or electric power works, heating works, telephone lines, street railways, bridges and ferries, and such other public utilities as the council may designate, and to issue bonds therefor; provided, however, no contract or agreement for the purchase, condemnation, ownership, construction or operation by the city of any public utility shall be entered into, nor bonds be issued therefor, by the council without first submitting such proposed contract or agreement to the qualified voters of the city. * * In case the vote shall be in favor of acquiring such public utility, then the proposition submitted receiving a majority of the votes cast upon the alternative propositions submitted shall be adopted. The council, in submitting propositions to the electors for the acquisition thereof, shall specify therein the amount of the proposed bonded indebtedness, the rate of interest thereon, and whether such bonded indebtedness shall be incurred. At least two-thirds of the electors voting thereon at such election shall be necessary to secure such acquisition, and to warrant the issuance of municipal bonds therefor.

* *"

A perusal of these provisions will show an intent on the part of the legislative assembly to restrict the taxing power of the city, and, as the limitation prescribed was a matter within the discretion of the legislature, with which the courts will not ordinarily interfere, the section and clause inveighed against do not contravene the fundamental law invoked to annul them: *Lent v. Portland*, 42 Or. 488 (71 Pac. 645); *Kadderly v. Portland*, 44 Or. 118 (74 Pac. 710, 75 Pac. 222).

Other questions are discussed in the brief of plaintiff's counsel, but deeming them unimportant or not involved herein, the decree is affirmed.

AFFIRMED.

Argued 15 January, decided 5 February, 1907.

STATE v. AYERS.

88 Pac. 653.

CRIMINAL LAW—REFERENCE TO COMMON LAW FOR DEFINITION.

1. Although there are no common law offenses in Oregon, the common law is still the source from which we draw the definitions of many offenses denounced by the code, and reference may properly be made thereto for that purpose.

DEGREE OF DEPRAVITY EVIDENCED BY POOL SELLING.

2. The selling for gain of pools upon horses which are to compete in public speed contests on a track is an act which "grossly" disturbs the public peace and welfare, and "openly" outrages public decency, within the meaning of those terms as used in Section 1930, B. & C. Comp.

POOL SELLING ON PRIVATE RACE TRACK AS A PUBLIC NUISANCE.

3. The sale of pools at the race course of a private corporation, but where the general public assembles, constitutes nevertheless a public nuisance, and is subject to the punishment imposed by Section 1930, B. & C. Comp.

GAMING—KEEPING HOUSE FOR SELLING POOLS—CRIMINAL OFFENSE.

4. The keeping of a house for selling pools on horse racing is not an offense punishable under Chapter 50, Deady's Gen. Laws, relating to the playing of games by gambling devices, since the winner is not determined by the manipulation of any device. The ticket issued by the seller cannot be considered a device influencing the result.

POOL SELLING—CONCURRENT AND EXCLUSIVE JURISDICTION OF MUNICIPAL CORPORATIONS AND THE STATE.

5. Where a municipality is given jurisdiction over a misdemeanor already punishable under a state law, the jurisdiction will be construed to be concurrent, unless the contrary clearly appears to have been intended.

For example: Section 1930, B. & C. Comp., prohibiting the selling of pools on horse races, as gambling, is not affected by Section 72 and Section 73, subd. 49, of the Charter of Portland of 1903, authorizing the prevention and punishment of gambling houses, there being no words of exclusion or restriction as to the state offense.

From Multnomah: ARTHUR L. FRAZER, Judge.

William M. Ayers appeals from a judgment of conviction for pool selling.

AFFIRMED.

For appellant there were oral arguments by *Mr. Martin Luther Pipes* and *Mr. Samuel Bruce Huston*, with a brief over the names of *Mr. Pipes*, *Mr. Huston*, *Mr. W. L. Boise* and *Mr. J. T. McKee*, to this effect:

We submit these propositions to be true: (1) The legislature only, and not the courts, can define crime and provide its punishment; and (2) The act prohibited by the law-making power must be defined with reasonable certainty so a reasonably intelligent person may understand what act is prohibited. In Oregon there are no common-law crimes, and every criminal statute must within itself define the prohibited act (*State v. Mann*, 2 Or. 238), which must inevitably be the rule where the legislative and judicial branches of government are separate, as in the United States. This is the distinguishing characteristic of the American form of government. The English judges did not hesitate to entirely create new crimes, and they defined a crime if they thought some act ought to be punished though not denounced by any existing statute. Applying this limitation specifically it will appear that Section 1930, B. & C. Comp., prohibits most everything that a trial judge may happen to consider misconduct. The results of the acts prohibited are as extensive as the domain of human conduct, it being evidently the intention of the legislature to make the courts the residuary legatees of the balance of its power to punish crime, and to invest them with jurisdiction to define and punish any act overlooked in the category of crime. It meant in the unoccupied field to vest the judges in Oregon with the power of the English judges.

Another construction has been given this section in the Nease Case in 46 Or. 433, where it held that it was intended to punish nuisances as defined by the common law. We submit that at common law there was no definite description of a nuisance, as the acts constituting that offense are of infinite variety. This

source of information is no more certain than the statute; to send the citizen to the common law to find what acts this statute prohibits is to turn him loose in a wilderness of judicial decisions to find what the legislature should itself have specified. If there are no crimes except those defined by statute, then the definitions must be there and not in the unwritten law or judicial decisions of England. The legislature has not given authority to go elsewhere for definitions, and we submit that no authority can come from any other source, and without distinct authority so to do the courts should not undertake to supply a definition that the legislature omitted to make. The court in the *Nease Case* went, without any authority, to the ancient and unwritten law of another country to find whether the judges there had prohibited the keeping of pool rooms, and then incorporated what was found into our statute. Our legislature has not, either directly or impliedly, prohibited keeping pool rooms; only this court has done that.

But this is not and never was a nuisance statute, and this court erred in so holding in the *Nease Case* for two reasons: The section includes acts that never were indictable nuisances, only those being indictable that affected the public welfare, and the offense is not defined. Authority to define crimes and to designate what acts shall be punishable as crimes cannot be delegated: 6 Am. & Eng. Enc. Law (2 ed.), 1028; *State v. Gaster*, 45 La. Ann. 636; *Montross v. State*, 61 Miss. 429; *State v. Gaunt*, 13 Or. 115 (9 Pac. 55).

A comparison of the statutes on this subject will show that the legislature did not mean to include pool selling under this dragnet section.

If the act of pool selling ever was prohibited, the statute has been repealed by implication by the granting to the City of Portland of the powers enumerated in Sections 72 and 73 of the Charter of 1903. Where a city is given exclusive power to punish gaming it has the effect of repealing the state law: 14 Am. & Eng. Enc. Law (2 ed.), 695; *Rogers v. People*, 9 Colo. 450 (59 Am. Rep. 146; 12 Pac. 843); *State v. Gordon*, 60 Mo. 383.

For the State there was an oral argument by *Mr. Bert Emory Haney*, with a brief over the names of *A. M. Crawford*, Attorney General, *John Manning*, District Attorney, and *Mr. Haney*, to this effect:

Section 1930, B. & C. Comp., is a re-enactment of the common law on the subject of public nuisances as to health, peace and morals. Whatever, therefore, could be punished at common law, because it tended to grossly disturb the public peace or health, or to openly outrage public decency or to injure public morals, can be punished under our statute: *Endlich*, Interp. Stat. §§ 3 and 75; *Sutherland*, Stat. Const. §§ 247-253; *State v. Nease*, 46 Or. 433 (80 Pac. 897); *State v. Bertheol*, 6 Blackf. 474 (39 Am. Dec. 442); *Burk v. State*, 27 Ind. 430; *State v. Taylor*, 29 Ind. 517; *State v. Birdetta*, 73 Ind. 185 (38 Am. Rep. 117); *Western Union Tel. Co. v. Scircle*, 103 Ind. 227 (2 N. E. 604); *United States v. Jones*, 3 Wash. (C. C.), 209.

We submit that, while there are no common-law offenses in Oregon, it is quite proper to go to the common law for definitions of crimes denounced by our statutes. The decision in the *Nease Case* so holds, and we do not admit for a moment that it was judge-made law rather than legislative law. To cite a case in point, we have a statute forbidding and punishing an assault, being armed with a dangerous weapon, and on many occasions this court has declared that different articles were dangerous weapons—articles that are ordinarily used for peaceable uses. Even counsel for appellant will not claim those rulings to be judge-made law. What is the difference between those cases and this one? We submit, none!

Maintaining a place for the sale of pools on horse races, where large numbers of persons (alleged in this case to be "many thousands, of all classes,") congregate to bet on horse races, constitutes a public nuisance under all rulings everywhere: *State v. Nease*, 46 Or. 433 (80 Pac. 897); *Vanderworker v. State*, 13 Ark. 700; *Thatcher v. State*, 48 Ark. 60 (2 S. W. 343); *Lord v. State*, 16 N. H. 325-330 (41 Am. Dec. 729); *Thrower v. State*, 117 Ga. 753 (45 S. E. 126); *People v. Jackson*,

3 Denio, 101; *King v. People*, 83 N. Y. 587; *State v. Mosby*, 53 Mo. App. 571; McClain, *Crim. Law*, § 1169; 2 Roscoe, *Crim. Ev.* § 1029.

The charter of the City of Portland has not repealed the state law against gambling: McClain, *Crim. Law*, § 1306; 14 Am. & Eng. Enc. Law (2 ed.), 695; *Berry v. People*, 36 Ill. 429; *State v. Caldwell*, 3 La. 435; *Odell v. City of Atlanta*, 97 Ga. 670 (25 S. E. 173); *Schuster v. State*, 48 Ala. 199; Const. Or. Art. XV, § 4; *State v. Burchard*, 2 Or. 80; *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642); *State v. Nease*, 46 Or. 433 (80 Pac. 897).

The defendant's construction of Section 72 of the Portland charter is wrong; the word "exclusively" therein refers to the exercise of legislative authority by the council as distinguished from other city officials. The section means that no legislative authority shall be exercised for or on behalf of the city except by the common council, and such a grant as that will at most confer only concurrent jurisdiction over the offenses enumerated. There is no repeal in such cases unless it is clear that the legislature meant to grant exclusive jurisdiction to the city, which is not the case here.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendant, William M. Ayers, was accused by an information of the crime of wilfully committing an act which grossly disturbed the public peace, openly outraged public decency, and injured the public morals, alleged to have been perpetrated in Multnomah County, August 4, 1905, and prior thereto, by habitually selling for gain pools upon horses at an exhibition trial of their speed on a race track, particularly describing the place and the method pursued, and that he there, and on the day mentioned, sold a ticket upon a certain horse to one Victor Lindback, receiving therefor the sum of \$20, to the common nuisance of all good citizens, and contrary to the statutes, etc. A demurrer to the information, on the ground that it did not state facts sufficient to constitute an offense against the laws

of Oregon, having been overruled, a plea of not guilty was interposed, whereupon the defendant stipulated that the facts stated in the information were true and submitted the cause to the court, without the intervention of a jury, to determine whether or not he was guilty as charged, and, having been convicted thereof, he appeals from the judgment which followed.

1. The finding of his guilt conforms to the decision rendered in the case of *State v. Nease*, 46 Or. 433 (80 Pac. 897), and is based on an alleged violation of the following statute, to wit:

"If any person shall wilfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor by this code, upon conviction thereof, shall be punished," etc.: B. & C. Comp. § 1930.

It is contended by defendant's counsel that, as this section neither names any offense at common law, so that reference might be had thereto for a more specific description, nor specifies any particular act that is denounced as a crime, an error was committed in observing the rule adopted in the case mentioned. As no common-law offenses are recognized in this state (*State v. Vowels*, 4 Or. 324; *State v. Gaunt*, 13 Or. 115: 9 Pac. 55; *State v. Nease*, 46 Or. 433: 80 Pac. 897), it is necessary for the legislative assembly by statute to specify crimes and to prescribe punishments therefor, in order to make their enactments enforceable. In *Hackney v. State*, 8 Ind. 494, decided in 1856, it was held that there were not then in Indiana any common-law offenses, the court remarking: "We cannot look to the common law for the definition of a nuisance or any other crime," but that decision was evidently rendered after the passage of an act requiring all offenses committed in that state to be defined by statute (*Burk v. State*, 27 Ind. 430), for prior thereto the rule had been that reference might be had to the ancient law to ascertain of what facts the crime of nuisance consisted: *State v. Bertheol*, 6 Blackf. 474 (39 Am. Dec. 442). Lord Coke, in discussing the principles of the common law and describing a

species of crime cognizable thereat, says: "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in *rerum natura* under the king's peace, with malice forethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, etc., die of the wound. or hurt, etc., within a year and a day after the same": 3 Coke's Institutes, 47.

If our statute, embodying parts of Sections 1741 and 1751, B. & C. Comp., had delineated the commission of an offense and prescribed a punishment as follows: "If any person shall purposely, and of deliberate and premeditated malice, kill another, such person, upon conviction thereof, shall be punished with death," the elements of the common law could undoubtedly be examined to ascertain the name anciently given to the classification of such crime: *State v. DeWolfe*, 67 Neb. 321 (93 N. W. 746). In the case last cited, the defendant was charged with maintaining a nuisance by unlawfully exposing the citizens of a village to a contagious disease in negligently keeping an infected person in a public place. A demurrer to the information having been sustained on the ground that the Code of Nebraska particularly sets forth the conduct which constitutes a nuisance and provides a penalty therefor, but did not include the acts complained of, the action was dismissed and the state appealed. In reversing the judgment, Mr. Chief Justice SULLIVAN says: "In this state all public offenses are statutory, no act is criminal unless the legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law. * * But, while there are in this state no common-law crimes, the definition of an act which is forbidden by the statute, but not defined by it, may be ascertained by reference to the common law." See, also, *Smith v. State*, 12 Ohio St. 466 (80 Am. Dec. 355); *Prindle v. State*, 31 Tex. Cr. R. 551 (21 S. W. 360; 37 Am. St. Rep. 833). In the case at bar, the character of the act which constitutes the offense is stated in the statute, and, though the enactment does not define

the crime, it specifies the facts which evidence the commission thereof.

2. It is argued, however, that the only human conduct thus denounced is such as, in the opinion of the courts, might seem "grossly" to injure the person or property of another, or "grossly" to disturb the public peace, or "openly" to outrage public decency, thereby necessitating a resort to the principles of the common law to determine whether or not any particular act comes within the prohibition, when recourse should only be had to a statute which clearly defines the behavior inveighed against. Our statute makes it a crime for any person, being armed with a dangerous weapon, to assault another with such instrument (B. & C. Comp. § 1771), without in any manner attempting to define the weapon. "Some weapons under particular circumstances," says Mr. Justice STRAHAN in *State v. Godfrey*, 17 Or. 300 (20 Pac. 625; 11 Am. St. Rep. 830), "are so clearly lethal that the court may declare them to be such as a matter of law." The rule by which the conclusion is deduced that an instrument which, when violently used, is ordinarily capable of producing death or great bodily harm, and therefore dangerous, is derived from the common law. As this principle is based on the degree of harm that is commonly incident to the impetuous use of a weapon, and can be invoked when occasion demands its exercise, a court, upon principle, ought to be equally as competent to determine what acts of a person "grossly" injure, etc., or "openly" outrage the public decency. In *State v. Nease*, 46 Or. 433 (80 Pac. 897), Mr. Justice BEAN portrays the mischievous consequences that attend the keeping of a gaming house for the sale of pools on horses at races, and shows the evil effect of the dealing upon the persons who visit these gambling places or witness the operations conducted thereat, and, in view of such pernicious result, we entertain no doubt that the offense which the defendant stipulated that he committed comes, as a matter of law, within the degree of "grossly" outraging public decency and also injuring public morals.

3. The sale of pools by the defendant is alleged to have been

at the course of the Multnomah Fair Association, a corporation, where, on the day named, were assembled many thousands of people to witness the racing of horses. That the offense charged was the commission of a public nuisance, affecting the general welfare, and therefore subject to the punishment imposed by Section 1930, B. & C. Comp., is, in our opinion, unquestioned, and whether or not the statute may have been intended to include private nuisances, which were not recognized as crimes at common law, is not deemed necessary to a decision herein.

4. It is insisted by defendant's counsel that the section under consideration does not include the keeping of houses for selling pools on horse racing, because another part of the code, adopted at the same time, prescribes a punishment for such conduct. The section mentioned was passed October 19, 1864, appears in the General Laws of Oregon, 1845-1864, and is compiled and annotated by M. P. Deady as Section 659 of Chapter 49. The next chapter of that compilation, the other part of the code referred to, embraces Sections 666 and 681, inclusive, which relate to the playing of games, etc., by gambling devices for money, property or any representation thereof. In the brief of defendant's counsel on this branch of the case, the following statement is found: "And there can be no doubt that pool selling, as set out in the indictment, uses a device." A gambling device is any contrivance by the operation of which chances are determined whereby money or property is lost or won: *Portis v. State*, 27 Ark. 360; *In re Lee Tong* (D. C.), 18 Fed. 253; *State v. Herryford*, 19 Mo. 377. The keeping of a place for the sale of pools on horses by which money or property is staked on the result of a race is the maintenance of a gambling house: *Swigart v. People*, 50 Ill. App. 181; *Edwards v. State*, 76 Tenn. (8 Lea), 411. In such case, however, the chance upon which the wager is made and the money or property placed is the competitive speed of a particular horse that has been selected as the possible winner, and not upon the manipulation of any device. The ticket which the defendant is charged with having sold was undoubtedly designed to evidence a contract,

but from the manner of its use, we do not think it can be classed as a gambling device, and hence conclude that the selling of pools on horse races was not included in Chapter 50 of the compilation mentioned.

5. It is also maintained by defendant's counsel that, if Section 1930, B. & C. Comp., ever prohibited the selling of pools on horse races, the statute in this respect was repealed by the adoption of the charter of the City of Portland, within the limits of which the act complained of occurred. The clauses of the action of incorporation thus relied upon are Section 72, which confers upon the council exclusive legislative power, etc., and subdivision 49 of Section 73, which authorizes the prevention and punishment of gaming and gambling houses: Sp. Laws 1903, pp. 3, 26 and 3, 33. It will be remembered that the defendant stipulated that he committed the act charged in the information as therein alleged. The following averment is contained in the written accusation, to wit:

"That the said race track is situated about two miles from the courthouse in the said City of Portland, and is in the suburbs of the said city."

Whether or not the race track mentioned is within the limits of the municipality is not clearly disclosed by the information, but, as counsel for the respective parties have so treated it, we shall assume the course is within the boundaries thereof. "The legislature," says Mr. Justice WAGNER, in *State v. Gordon*, 60 Mo. 363, "has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others. When the power to hear and determine these minor offenses is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the state and the corporation will be construed to be concurrent, but where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail." To the same effect, see, also, 14 Am. & Eng. Enc. Law (2 ed.), 695; *State v. Haines*, 35 Or. 379 (58 Pac. 39; 2 Munic. Corp. Cas. 430);

Rogers v. People, 9 Colo. 450 (12 Pac. 843: 59 Am. Rep. 146);
Berry v. People, 36 Ill. 423.

The charter of the City of Portland does not purport to confer exclusive jurisdiction to prevent gambling houses, and, as the crime of gaming was recognized at common law (4 Blackstone's Commentaries, *171), the circuit court had jurisdiction of the case at bar, and the judgment rendered therein is affirmed.

AFFIRMED.

Decided 26 February, 1907.

HAINES MERCANTILE CO. v. HIGHLAND MINES CO.

88 Pac. 865.

CORPORATIONS—VALIDITY OF MORTGAGES MADE BY OFFICERS AND DIRECTORS FOR THEIR OWN BENEFIT.

The officers and directors of a corporation act in a fiduciary capacity and cannot represent the company and themselves at the same time.

The stock, with the exception of two shares, of a corporation, the directors of which were S, K, and J, was issued to K for a conveyance to it of K's mines. K then contracted to sell the stock to S for \$45,000, and deposited it in escrow with a bank. After S had defaulted on his contract, the directors adopted a resolution reciting that the corporation had purchased of K the mines for \$45,000, that \$35,500 thereof remained unpaid, and directing S, the president, and J, the secretary, to execute to K notes for such sum, secured by mortgage on the mines, which they did. Thereupon K released his claim on the stock deposited in escrow, and authorized the bank to deliver it. *Held*, that the resolution reciting the indebtedness of the corporation to K for the purchase price of the mines, having required the vote of either S or K, both of whom were directly and personally interested therein, was of no force, so that the mortgage, which was to secure the debt of one director to another, was void, there being only the indirect benefit to the corporation that with shares thus released an overissue of stock, for which the corporation was liable, was taken up.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by the Haines Mercantile Co., a private corporation, against the Highland Gold Mines Co., another corporation, and M. H. Knapp.

The facts out of which the litigation arises are as follows: In January, 1903, the defendant the Highland Gold Mines Co. was organized with a capital stock of \$3,000,000, divided into

shares of \$1 each, for the purpose of taking title to, developing and operating, a group of mines in Baker County, belonging to the defendant Knapp. Knapp subscribed for all the capital stock except two shares, which were subscribed by N. J. Sorenson and J. Frank Shelton, respectively. Knapp, Sorenson and Shelton were elected directors, and they elected Sorenson president, Knapp vice-president, and Shelton secretary. Thereafter Knapp submitted to the directors a proposition in writing to convey to the corporation the mining claims referred to in payment of his subscription to its capital stock. This proposition was accepted, the conveyance made and certificates duly and regularly issued to Knapp for 2,999,998 shares of paid-up capital stock. On the next day Knapp entered into a written contract with Sorenson for the sale to him of his (Knapp's) entire holdings in the corporation for \$45,000—\$2,500 of which was paid in cash at the time, and the remainder was to be paid at stated intervals. Under this contract, and in pursuance thereof, Knapp deposited the shares of stock held by him in the Citizens' National Bank at Baker City in escrow, with authority to the bank to deliver to Sorenson, or his order, one share for every three cents paid into the bank to the credit of Knapp, which amounts should be applied to and considered a payment on the contract for the purchase of such stock by Sorenson. On the same day Sorenson entered into a contract with the mines company, signed by Knapp as vice-president, and Shelton as secretary, by which he agreed to donate and place in the treasury of the company 750,000 shares of the stock contracted to be purchased by him of Knapp upon the completion of such contract, less the number of shares sold or disposed of by him prior thereto for company purposes, and in the meantime he was given the right by the company to work and develop the mines as to him might seem for the best interests of the company. Sorenson thereafter sold and disposed of to divers and sundry persons about 1,200,000 shares of stock, of which many were an overissue; the proceeds of which he used in developing and operating the mines and in payment of \$8,000 to the Citizens'

National Bank on the contract for the purchase of Knapp's stock. He thereafter defaulted in his payments under the contract with Knapp.

On April 23, 1905, a meeting of the board of directors of the corporation was held, Sorenson, Knapp and Shelton being present, when a resolution was introduced and adopted, reciting that the company had purchased of Knapp the mining claims referred to for \$45,000, no part of which had been paid except the sum of \$10,500, leaving due thereon, principal and interest, \$35,500, and directing the president and secretary to execute and deliver to Knapp the notes of the company for such amount, and to secure the payment of the same by mortgage on the mining property theretofore conveyed to it by Knapp. The notes and mortgage were thereupon executed on behalf of the company by Sorenson as president, and Shelton as secretary, and Knapp released the stock held in escrow by the Citizens' National Bank, and part thereof was used by Sorenson in taking up and canceling the overissue previously sold by him.

Between the 1st of December, 1903, and the 28th of April, 1905, the plaintiff, the Haines Mercantile Company, sold to the defendant corporation materials, provisions and supplies amounting to \$4,214.35, which it is alleged were used in working and developing the mines. No part of this sum has been paid except \$2,052.91. On May 13, 1905, the plaintiff filed in the appropriate office a lien on the mines for the balance claimed to be due, and, on the 15th of the same month, brought this suit to foreclose such lien, making Knapp and the company parties defendant. The corporation admitted the validity of the plaintiff's lien, but it was denied by Knapp, who, by way of cross-bill, set up the mortgage given to him by the corporation, and prayed a foreclosure thereof and the sale of the mining property to satisfy the same. The plaintiff and the defendant corporation answered the cross-bill of Knapp, denying the affirmative matters alleged therein, and pleading that the mortgage given to him by the corporation was without consideration, *ultra vires*, and void, and prayed that the same be surrendered up and

canceled. The court below found that the claim of the plaintiff was a valid and subsisting lien upon the property of the corporation, and that the mortgage to Knapp was without consideration and void, and entered decree accordingly. From this decree, Knapp appeals.

AFFIRMED.

For appellant there was a brief over the name of *Hart & Smith*, with an oral argument by *Mr. Julius Newton Hart*.

For respondent Haines Mercantile Co. there was a brief over the names of *Lomax & Anderson* and *Morton D. Clifford*, with an oral argument by *Mr. Leroy Lomax* and *Mr. Clifford*.

For respondent Highland Gold Mines Co. there was a brief over the names of *T. H. Crawford*, *Butcher*, *Clifford & Correll* and *N. C. Richards*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The defendant corporation admits the validity of the lien sued upon by the plaintiff, and it is denied by Knapp alone. Unless he has a valid and subsisting mortgage upon the property against which it is sought to enforce the lien, he is not in a position to question the legality thereof. It requires no argument or citation of authorities to show that, upon the facts as they appear from the records of the corporation defendant, and the several written agreements and contracts offered and admitted in evidence, the mortgage from the defendant company to Knapp was void and of no effect. This evidence shows that it was given by the authority of the directors of a corporation, a majority of whom were personally interested, to secure the payment of a debt from one of such directors to another, and not for any consideration moving to the corporation. It is common learning that the directors and officers of a corporation act in a representative and fiduciary capacity, and have no right to mortgage the corporate property for their personal benefit or to represent the corporation in contracts or transactions in which they are personally interested, and, if they do, the contract or transaction is void: *Clark, Corporations*, 508; *Curtin v. Salmon River Min. Co.* 130 Cal. 345 (62 Pac. 552; 80 Am. St. Rep.

132); *People v. Township of Overyssel*, 11 Mich. 222; *Haywood v. Lincoln Lum. Co.* 64 Wis. 639 (26 N. W. 184).

It is urged, however, that the organization of the defendant corporation, and the making of the several contracts and agreements mentioned, were merely designed as a means of enabling Knapp to sell and dispose of his mining property, and the effect of the transactions was to sell such property to the corporation for \$45,000, and the mortgage in question was given to him to secure the corporate debt. But the intention of the parties, and the legal effect of their acts, must be determined by what they did, and not by what Knapp supposed they were doing. It is undisputed that the corporation was regularly organized with Knapp's knowledge and assistance; that he subscribed for all of its capital stock except two shares, and conveyed to it the mining property in question in payment for such stock and received certificates therefor. The corporation thus became the owner of the mining property, and Knapp of the stock, and the property was paid for by the corporation, by the issuing and delivering to Knapp of such stock. He thereafter contracted and agreed to sell his stock to Sorenson for the sum of money named, and Sorenson thereby became liable to him for the purchase price of such stock, and there is no process of reasoning by which this indebtedness can be transferred from Sorenson to the corporation. The resolution of the board of directors, reciting that the corporation was indebted to Knapp for the purchase price, was not in accordance with the undisputed facts, and could not have been adopted without the vote of either Sorenson or Knapp, who were directly and personally interested therein; and it is therefore of no force or effect, and cannot be deemed an assumption by the corporation of the debt due Knapp from Sorenson on the purchase price of the stock, if such an act would have been valid in any event.

It is contended, however, that the stock placed by Knapp in escrow in the bank under the contract for the sale thereof to Sorenson was, upon the execution of the note and mortgage by the corporation, turned over by Knapp to Sorenson for the use

and benefit of the corporation, and that the corporation cannot repudiate or deny the validity of the transaction without returning the stock to Knapp. This contention is not supported by the evidence. The testimony is that upon the execution of the mortgage Knapp released the shares of stock theretofore deposited by him with the bank as security for the purchase price, and authorized the bank to deliver all that remained unsold thereof, and released all claims thereto. There is no evidence to whom or for whose benefit the stock was released, but the necessary presumption is that it was delivered to Sorenson, who had contracted to purchase it, and who was entitled to its possession under the terms of the contract between himself and Knapp, and, in the absence of proof of any agreement or understanding to the contrary, the stock must be held to have been delivered to Sorenson for his own benefit, and not that of the company.

Again, it is contended that the corporation was liable in damages to the holders of the overissue of stock sold by Sorenson, and that Sorenson was enabled to take up and cancel such overissue with that delivered to him by Knapp, and thus release the company from liability on account of such overissue; and that this constituted a sufficient consideration to support the mortgage from the company to Knapp. That an indirect benefit of this kind is not a sufficient consideration to make a valid and binding transaction, where the directors of the corporation have, in violation of their duty and trust, mortgaged or pledged the corporate property to secure the payment of a debt of one director to another, is too evident to need elaboration. Sorenson was one of the directors of the corporation, and its president. Knapp was another director, and its vice-president. The two constituted a majority of the board, and it was by their votes that the mortgage was authorized. It was therefore void, and cannot be given validity, because the corporation may be indirectly benefited in some way by the transaction.

AFFIRMED.

Argued 23 January, decided 26 February, rehearing denied 16 July, 1907.

STATE v. KELLIHER.

88 Pac. 867.

INDICTMENT—MOTION TO QUASH—ENDORSEING NAMES OF WITNESSES.

1. Though Section 1284, B. & C. Comp., defining when a grand jury ought to find an indictment, is applicable to the filing of an information by a district attorney, and he is in duty bound to endorse on the information the name of every witness whose testimony has been considered, a failure to observe these requirements cannot be taken advantage of by a motion to quash, the penalty for omitting the names of witnesses being inability to call them on the trial. Nor will a motion to quash lie on any other grounds than those prescribed by Section 1349, B. & C. Comp.: *State v. Whitney*, 7 Or. 386, followed, and *State v. Justus*, 11 Or. 178, doubted.

INSTRUMENT IN NAME OF FICTITIOUS PERSON AS FORGERY.

2. An instrument executed in the name of a fictitious person purporting to assign all the right, title and interest of the grantor in and to certain public land described in a certificate of sale theretofore issued by the State Land Board to such fictitious person is a "deed" within the meaning of Section 1858, B. & C. Comp., which provides a punishment for any person who shall falsely make, forge or counterfeit any deed.

CRIMINAL LAW—EVIDENCE OF OTHER LIKE OFFENSES.

3. Where evidence of an accomplice as to the commission by him of other similar acts about the same time is admitted for the purpose of showing guilty knowledge and intent in the defendant, there must be other testimony connecting defendant with such acts or the evidence should be withdrawn by the court.

CORROBORATING TESTIMONY OF ACCOMPLICE.

4. This case affords an example of the rule established in Oregon by Section 1406, B. & C. Comp., that a conviction cannot be had on the uncorroborated testimony of an accomplice.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. JUSTICE EAKIN.

Appellant, A. T. Kelliher, is accused by an information jointly with H. H. Turner, with the forgery of a certain instrument in writing, viz., a deed, by signing the name of G. I. Rice to an assignment to this appellant of a certificate of sale of school lands, issued by the State Land Board to G. I. Rice, such assignment being executed and acknowledged in the same manner as a deed to real estate. This appellant was tried alone, and, upon conviction, brings this appeal. The instrument alleged to have been forged is in the following language, viz.:

"Know all men by these presents:

That I, G. I. Rice, to whom the annexed certificate of sale No. 13,015 was executed by the State Land Board of the State of Oregon, for the following described land, situated in Morrow County, State of Oregon, to wit: The E. $\frac{1}{4}$ of section 36, township 5 S., range 26 E. of the W. M., containing 320 acres, have, for a valuable consideration, to me in hand paid by Alfred T. Kelliher, hereby assign and transfer to said Alfred T. Kelliher all my right, title, interest and claim of, in and to the said described land, and I hereby authorize the said State Land Board to execute a deed to Alfred T. Kelliher for said described land.

Witness my hand and seal this 19th day of August, A. D. 1902.

Signed, sealed and delivered
in presence of:

G. I. Rice. [Seal.]

T. N. Denham,
H. H. Turner.

State of Oregon, County of Marion—ss.:

This certifies that on this 19th day of August, A. D. 1902, before me, the undersigned, a notary public in and for said county and state, personally appeared the within named G. I. Rice, who is known to me to be the identical person described in, and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses therein mentioned. In testimony whereof, I have hereunto set my hand and seal the day and year last above written.

[Notarial Seal.]

H. H. Turner,

Notary Public for Oregon."

The name of O. West only is inserted at the foot of the information as a witness examined before the district attorney. At the trial the information was dismissed as to H. H. Turner that he might be used by the state as a witness. In the year 1900, this appellant made arrangements with Turner to procure for him persons to sign applications for the purchase of school lands from the State of Oregon, and to procure from such applicants, assignments to the appellant of the certificate issued by the State Land Board for the lands so applied for. Under this arrangement, Turner, on August 16, 1902, produced the G. I. Rice application and the assignment of the certificate of sale to

be issued thereon. G. I. Rice was the name of a fictitious person, and the name was signed by Turner to the application for the purchase and to the assignment to the appellant of the certificate of sale; both being signed on the same day, but the assignment was dated August 19, 1902. Turner testified also that in August and September, 1902, he procured for appellant about 30 other applications for the purchase of school land, and assignments of the certificates of sale to be issued therefor; the signatures to which were also names of fictitious persons, and the name of the applicant was signed by him to the application and to the assignment in each case. There was no evidence except Turner's of any of these 30 applications, including the G. I. Rice application, having ever been in the hands of the appellant; but the certificates when issued were all turned over to the appellant, and he furnished to the clerk of the state land board the money to cover the first payment on the applications, and all the applications were procured by Turner for appellant's benefit, and appellant furnished Turner the descriptions of the lands to be placed in the applications.

REVERSED.

For appellant there was a brief over the names of *Edward Byers Watson*, *George Greenwood Bingham* and *P. H. D'Arcy*, with oral arguments by *Mr. Watson* and *Mr. Bingham*.

For the State there was a brief with oral arguments by *Mr. John H. McNary*, District Attorney, and *Mr. Charles Linza McNary*.

MR. JUSTICE EAKIN delivered the opinion of the court.

Appellant filed a motion to quash the information for the reasons, in substance: (1) That the names of the witnesses examined by the district attorney are not indorsed on the information; (2) that the information is based on evidence of other witnesses than the one indorsed thereon; (3) that West, whose name is indorsed, had no knowledge of the facts upon which the information is based; and (4) that there was no legal evidence before the district attorney to sustain the charge, and the motion was based wholly upon matter disclosed by affidavits.

1. Section 1284, B. & C. Comp., provides:

"The grand jury ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."

This section applies equally to the district attorney in finding an information, and neither the grand jury nor the district attorney has any authority to find a true bill unless the evidence before them or him is sufficient in their judgment to warrant a conviction, and the name of every witness whose evidence was considered in investigating the charge must be inserted at the foot of, or indorsed on, the information: B. & C. Comp. § 1262. Mr. Justice WOLVERTON, in *State v. Warren*, 41 Or. 348, 356 (69 Pac. 679), referring to this Section 1262, says: "This statute was enacted for a purpose, and that was evidently to afford the accused an opportunity of ascertaining the names of the witnesses with whom he would probably be confronted at the trial. * * Such statutes are mandatory in character, and should be observed to the letter by the executive officers of the law."

But it does not follow that the defendant in a criminal case can, by motion to quash, require the district attorney or the grand jury to disclose what evidence was before him or them. Nor can its sufficiency be questioned by motion and affidavit. It does not appear in this case that there were any witnesses examined by the district attorney relating to this charge, whose names are not indorsed on the information. If, at the trial, it appears that others were examined, and their names were not so indorsed, then by Section 1262, they cannot be heard against the defendant at the trial. And whether the evidence of O. West and the records before the district attorney were sufficient to justify the finding of the information is not a matter that can be tried out by the court on affidavit. Otherwise every case by indictment or information could be brought before the court by motion, and the district attorney or the grand jury, respectively, required to disclose all the evidence before them and the court determine whether it was sufficient. In *State v. Grady*, 84 Mo. 220, 223, the court holds that of the sufficiency of the

evidence the grand jury are the judges. "If it were otherwise, it would result that the court would become the tribunal to indict." Section 1349, B. & C. Comp., provides:

"The indictment must be set aside by the court, upon the motion of the defendant, in either of the following cases: (1) When it is not found, indorsed, and presented as prescribed in Chapter VII of Title XVIII of this code; (2) when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon."

The ground of the motion relied on here does not come within the provisions of this section; and in *State v. Whitney*, 7 Or. 386, it was held that these are the only two cases for which an indictment can be set aside. Although, in *State v. Justus*, 11 Or. 178 (8 Pac. 337: 50 Am. Rep. 470), it is intimated, though not decided, that irregularities in proceedings before grand juries, not covered by Chapter VII, may, under some circumstances, be taken advantage of by motion to quash. However, even if the motion will lie to quash an indictment for irregularities in the proceedings before the grand jury or the district attorney, not prescribed by Chapter VII, still such motion cannot be permitted to question the sufficiency of the evidence to justify the indictment, and the motion was properly denied.

2. The appellant demurred to the information, for the reason that the facts stated did not constitute a crime, viz., that the forged instrument is not a deed within the meaning of Section 1858 of the code. This section provides:

"If any person shall, with intent to injure or defraud any one, falsely make, alter, forge or counterfeit * * any contract, charter, letters patent, deed, lease, * * writing obligatory, * * such person, upon conviction thereof, shall be punished," etc.

By Section 3306 of the code it is provided that when the State Land Board accepts an application to purchase school land, "the State Land Board shall * * deliver to the purchaser a certificate that he has purchased the lands therein described."

This amounts to a sale of the land, but the title remains in the state until the balance of the price is paid, and the certifi-

cate transfers an equity in the land to the purchaser; and it would seem from the decision of *Gliem v. Board of Commissioners*, 16 Or. 479 (19 Pac. 16), that the purchaser or his assignee can compel the board to convey it to him if he has complied with all the requirements of the law; and Section 3309 of the code recognizes the purchaser's right to transfer his interest in the land by assignment of the certificate, but provides that such assignment shall be executed and acknowledged in the same manner as a deed to real estate.

The operative words of this forged instrument are:

"Have * * hereby assigned and transferred * * all my right, title, interest and claim."

In *Lambert v. Smith*, 9 Or. 185, 193, LORD, C. J., says: "The word, then, 'convey,' or 'transfer,' in a deed, is of equivalent signification and effect as 'grant.'" In *Field v. Columbert*, 4 Sawy. 527 (Fed. Cas. No. 4,764), FIELD, J., says: "Any words in a deed indicating an intention to transfer the estate, interest or claims of the grantor, will be a sufficient conveyance, whether they be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of 'possession.'"

Our statute designates no form in which a conveyance shall be made, except that it shall be made by deed, and the only question, then, is whether there was in this case any land or any estate or interest therein upon which the deed might operate, and, as we have seen that the certificate of sale is evidence of an interest in the land, although not of the legal title, it establishes an equitable interest. Notwithstanding the certificate is issued to a fictitious person, and the forgery is the forgery of the name of the fictitious purchaser, it is, nevertheless, forgery if done with fraudulent intent, and the instrument is capable of effecting a fraud. Mr. Justice BEAN, in *State v. Wheeler*, 20 Or. 192, 195 (25 Pac. 394; 10 L. R. A. 779; 23 Am. St. Rep. 119), a case of forgery by the use of the name of a fictitious person, says: "From the definitions of forgery, as above stated, as well as from the statute, it will be seen that the essen-

tial elements of the crime are: (1) a false making of some instrument in writing; (2) a fraudulent intent; (3) an instrument apparently capable of effecting a fraud." This instrument, in connection with the fictitious application of G. I. Rice, and the certificate of sale issued thereon, was being resorted to as a means of evading the law in procuring the title to school lands from the state, and thus intended as a fraud upon the state, and it is equally clear that it is an instrument capable of effecting a fraud upon the state, as, the forgery not being discovered, the title would eventually pass to the assignee of the certificate. Therefore we conclude that the assignment of the certificate of sale alleged in the information to be a forgery is a deed within the meaning of Section 1858, and the demurrer was properly overruled.

3. In the trial of the case the state offered and the court admitted in evidence testimony that Turner forged about 30 other applications for the purchase of school land from the state and assignments of the certificates to be issued therefor, all of which applications were for lands the descriptions of which were furnished by the appellant, and the certificates when issued, with the assignments, were turned over to the appellant as in other cases. There was no evidence that the appellant forged any of these applications or assignments or was present when it was done. Nor any evidence that the appellant was a party thereto, or knew that they were forgeries, other than such inferences as were relied on to establish appellant's knowledge of the forgery of the Rice assignment; but the scienter of appellant is lacking in each of the substantive forgeries as in the principal case. The purpose of this evidence was to show guilty knowledge on the part of the appellant of the forgery of the Rice assignment, as tending to corroborate Turner as to appellant's connection with it, and the rule is that when the question of scienter, intent or identity is an essential ingredient of the crime on trial, and such knowledge is denied by the defendant, or mistake or accident claimed, proof of other like acts, even though they establish an independent crime, may be shown as tending to show guilty

knowledge or intent: *Farris v. People*, 129 Ill. 521 (21 N. E. 821: 4 L. R. A. 582: 16 Am. St. Rep. 283); *Commonwealth v. Ferrigan*, 44 Pa. 386; *People v. Seaman*, 107 Mich. 348 (65 N. W. 203: 61 Am. St. Rep. 326); *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892). And in this case, there being no direct evidence connecting the appellant with the forgery, evidence of other forgeries by Turner, without evidence tending to establish appellant's knowledge of or connection therewith, is not evidence of appellant's knowledge of or connection with the forgery of the Rice assignment. Upon offering another forged paper on the trial of a forgery case, it was held that, "not only must it be shown to have been forged, but the prisoner must be shown to have had questionable connection with it": *State v. Lowry*, 42 W. Va. 205 (24 S. E. 561); *People v. Bird*, 124 Cal. 32 (56 Pac. 639); *People v. Whiteman*, 114 Cal. 338 (46 Pac. 99). In *People v. Bird*, it is said: "If proof had been forthcoming to show the connection of defendant with these other checks which were said to have been forged, still such coincidence is not admissible to prove the *corpus delicti*, but only, after that has been established, to show guilty intent. And the prosecution assumed the same burden of proof as to each of the checks introduced to show guilty knowledge as in regard to the check for which he is being tried." And to the same effect is the case of *People v. Seaman*, 157 Mich. 348 (61 Am. St. Rep. 326: 65 N. W. 203), which contains an extended review of the cases on this subject. And there being no evidence other than the uncorroborated statements of Turner, an accomplice, that appellant was a party to the substantive forgeries, it was error to submit them to the jury.

4. It is claimed by counsel for the appellant that, Turner being an accomplice in the commission of the offense, conviction cannot be had on his testimony alone under Section 1406 of the code, and that there was no sufficient corroboration to connect the defendant with the commission of the crime; and the district attorney claims that sufficient corroboration is found in the fact that this application and assignment, as well as all the

others offered in evidence, were for the appellant's benefit and were in his possession, and that it was one of many acts in pursuance of a common design to defraud the state. There is no evidence but Turner's statements that appellant knew, or had any reason to believe, that the Rice application and assignment were forged, and Turner does not claim that it was ever mentioned between them, except in the remark made by appellant to "sign them yourself," when appellant was objecting to an application to which the applicant had made his mark, which might reasonably be held to refer to cases in which the applicant could not write. In the conversation at the post office in June, 1900, Turner claimed that he declined to go further with the work; "that it looked like perjury was being committed," but this referred only to actual purchasers swearing to applications, and not to fictitious applicants, and it is not claimed that any names of fictitious persons had been used at that time. It may be there was corroborating evidence that the appellant was a party to a common design to defraud the state by procuring persons to make applications to purchase land for the benefit of the appellant, but this is not the crime with which he is charged, and does not tend to connect the appellant with the forgery or to corroborate Turner as to appellant's part in the forgery. Where the common design of the appellant and Turner was to procure persons to sign applications to purchase school land for appellant's benefit, and this is the only common design disclosed, receiving the benefits of such acts by the appellant with knowledge of their character, does not tend to show that appellant was accepting the benefits of applications made in the names of fictitious persons with knowledge of that fact, or to show a common design to commit forgeries. The testimony as to the other forgeries and the forged applications offered in evidence were only competent to prove the scienter of the appellant as to the forgery of the Rice application and assignment, that being a point upon which Turner must be corroborated, as an element tending to show appellant's connection with the forgeries; but, as we have already seen, there was no proof of scienter in those

cases, and without that, multiplying them could not add that element: *State v. Fitchette*, 88 Minn. 145 (92 N. W. 527); *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892).

Turner, the accomplice, not being corroborated by other evidence tending to connect the appellant with the commission of the crime, or the circumstances of its commission, the evidence was insufficient to sustain the verdict, and the case is reversed and remanded to the court below for such further proceeding as may seem proper, not inconsistent with this opinion.

REVERSED.

MR. JUSTICE MOORE took no part in this decision.

Argued 9 October, decided 21 November, 1906.

STATE v. BRANTON.

87 Pac. 535.

INDICTMENT—DUPLICITY—DIFFERENT DEGREES—INTENT.

1. Since a greater offense always includes a lesser one of the same class, and as the intent with which a deadly weapon is used determines the grade of the offense committed, one may be convicted of an assault with a deadly weapon under a charge of an assault with intent to kill, the latter being an inferior grade of the former, and therefore an error in charging both crimes in one indictment is harmless.

CRIMINAL LAW—STANDARDS OF COMPARISON—HANDWRITING.

2. Under Section 777, B. & C. Comp., providing that evidence respecting handwriting may be given by a comparison by a skilled witness, or the jury, "with writings admitted or treated as genuine by the party against whom the evidence is offered," only writings admitted and treated as having been written by defendant personally can be used as a basis of comparison against one accused of crime.

CUMULATIVE EVIDENCE OF HANDWRITING—HARMLESS ERROR.

3. In a prosecution for assault with intent to kill, a poorly spelled letter, purporting to have been written by defendant and relating to his prospective marriage, was admitted in evidence after testimony by the recipient that she discussed its contents with defendant after she had received it. No expert based his opinion as to the genuineness of another incriminating letter purporting to have been signed by defendant, on a comparison with the first letter, and the attention of the jury, who had before them numerous genuine samples of defendant's handwriting, was not particularly called to such letter. *Held*, that, even if defendant's acknowledgment of the contents of the letter was not a sufficient admission of the genuineness of the penmanship to permit its use as a standard of comparison by an expert, yet its admission before the jury could have caused no appreciable injury to defendant.

FORMAL REQUISITES OF CRIMINAL JUDGMENT.

4. An order in a criminal case concluding, "It is therefore ordered that * * be confined in the penitentiary," etc., is a sufficient judgment. In this connection the word "considered" is frequently used, but it is not necessary.

From Lane: JAMES W. HAMILTON, Judge.

John Branton appeals from a conviction of an assault with intent to kill one John Fletcher.

AFFIRMED.

For appellant there was a brief over the names of *Johnson & Medley* and *Lark Bilyeu*, with oral arguments by *Mr. Bilyeu* and *Mr. J. C. Johnson*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *George M. Brown*, District Attorney, and *John Monroe Williams*, with oral arguments by *Mr. Brown* and *Mr. Williams*.

MR. JUSTICE MOORE delivered the opinion.

The defendant, John Branton, was accused by an information of the crime of assault with intent to kill, alleged to have been committed as follows:

"The said John Branton on the 9th day of March, A. D. 1905, in the said County of Lane and State of Oregon then and there being, did then and there with a certain revolver gun, loaded with gunpowder and leaden bullets and capable of being discharged, unlawfully and feloniously assault John Fletcher with the aforesaid gun by feloniously shooting and wounding him, the said John Fletcher, with said revolver gun, with intent him, the said John Fletcher, to kill and murder, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Oregon."

A demurrer to the information, on the ground that it attempted to charge the commission of more than one crime, was overruled, and, the cause being tried, the defendant was found guilty as charged, and appeals from the judgment which followed.

1. It is contended by his counsel that he was charged with the commission of the crime of assault being armed with a deadly weapon, and also with an assault with intent to kill. and that,

having challenged the information for duplicity, an error was committed in overruling the demurrer. The organic law declares that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him: Const. Or. Art. I, § 11. Statutes passed in pursuance of this fundamental requirement provide, in effect, that an information, which may take the place of an indictment (B. & C. Comp. § 1259), must be direct and certain as it regards the crime charged and the particular circumstances thereof when they are necessary to constitute a complete offense (B. & C. Comp. § 1306), and the information must charge but one crime and in one form only: B. & C. Comp. § 1308. When a formal criminal charge violates these provisions, and its compound aspect is pointed out by a demurrer, the challenge thus interposed should be sustained: *State v. Lee*, 33 Or. 506 (56 Pac. 415). The statute which the defendant is accused of violating contains the following provision:

"If any person shall assault another with intent to kill, * * such person, upon conviction thereof, shall be punished," etc.: B. & C. Comp. § 1767.

A kindred enactment is as follows:

"If any person, being armed with a dangerous weapon, shall assault another with such weapon, such person, upon conviction thereof, shall be punished," etc.: B. & C. Comp. § 1771.

It may be supposed that a person might intentionally attempt by violence to do another a bodily injury with a deadly weapon, without an intent to take the life of the person so assaulted. So, too, it can readily be seen that a person might assault another with a destructive instrument with intent to take the life of the latter. The design with which a deadly weapon is used in making an assault determines the grade of the offense, and, when a purpose to take the life of another accompanies the overt act, it augments the crime to an assault with intent to kill. A specification of such charge may, therefore, include the accusation of an assault with a deadly weapon: 1 Bishop, New Crim. Law, § 780, subd. 3; 1 McClain, Crimi.

Law, §§ 271, 272. Upon an accusation of the commission of a crime, consisting of different degrees, the accused may be found not guilty as charged and convicted of any degree inferior thereto (B. & C. Comp. § 1417); and when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he may be convicted of the lowest of these degrees only: B. & C. Comp. § 1394. The defendant, having been accused of the commission of an assault with intent to kill, could have been found guilty of an assault with a deadly weapon, which is a lesser offense, and as the crime with which he was charged consists of degrees, wherein the greater necessarily includes the less, he could not have been prejudiced by accusing him with the commission of the lesser offense also, if it be assumed that the information contains such a specification: *State v. McLennen*, 16 Or. 59 (16 Pac. 879); *State v. Lavery*, 35 Or. 402 (58 Pac. 107); *State v. Kelly*, 41 Or. 20 (68 Pac. 1).

2. It is maintained by defendant's counsel that the court erred in admitting, over objection and exception, certain immaterial manuscript, claimed by the prosecuting attorney to have been written by the defendant, without proof of such writings having been admitted or treated by him as genuine. The documents so received were introduced in evidence to establish a standard of comparison with the defendant's handwriting for the purpose of proving that he inscribed a letter that came by mail, addressed to the specified officer of the town where it purports to have been written, of which the following is a copy:

"Cottage Grove Or Mch 8 95

Marshel i leave this note to show that i have took my life and you will find me on the road between town and branton ranch i am tired living and leave this to save troubel for my friends and exponce to the county.

good Bye.

J. Fletcher."

As tending to incriminate the defendant, a fellow prisoner, who was confined with him in the Lane County jail, appearing as a witness for the state, testified that the defendant, referring

to Fletcher, the prosecuting witness, said, "I am sorry I left the s—— of a b—— without finishing him"; that the defendant offered to pay the fine imposed upon the witness if the latter would persuade Fletcher to accompany him to Astoria, where he was to be shanghaied or disposed of in some manner by persons whose names were stated; that the witness saw the defendant write a letter, which was given to him to be mailed when he had fully executed the commission, which letter is addressed to the then deputy district attorney, and, having been offered in evidence, over objection and exception, the following is a copy thereof, to wit:

"Astoria, June, 1905.

Eugene.

Mr. J. W. Williams as i am the gilty one in the Branton case i cant fase him in it so i ask you have him turned loose
J fletcher."

Mrs. Della M. Wetzel, a sister-in-law of the defendant, testified that she had corresponded with him, and, referring to letters purporting to have been written by him to her, January 24, 1892, and September 3, 1901, she stated that he told her he wrote them; that after she received a similar letter, dated June 28, 1903, she discussed with him the subject-matter and contents thereof; and that, alluding to a like letter of December 20, 1901, he inquired of her if she had told her father what he wrote her therein. These letters, over objection and exception, were received in evidence for the sole purpose of proving the basis of a comparison of handwriting, and are numbered, respectively, Exhibits 1, 2, 4 and 5. D. Linebaugh testified that the defendant, in his presence, subscribed his name to a note which stipulated for the payment to him of a sum of money, which written promise, over objection and exception, was received in evidence and numbered Exhibit 6. Several witnesses were thereupon called by the state, each of whom, having testified as to his qualifications, severally expressed, over objection and exception, an opinion that the letters, copies of which are hereinbefore set out, when compared with Exhibits 1, 5 and 6, were written by the defendant.

It is argued by defendant's counsel that no manuscript is competent as a basis of comparison of penmanship, by placing it in juxtaposition with other material writings, unless such document has been admitted or treated by the party against whom it is offered as genuine, is relevant to the issue to be tried, and has been received in evidence for some other purpose; that the exhibits mentioned did not tend to establish or disprove the defendant's guilt or innocence, and hence they were immaterial, and their introduction in evidence prejudicial. The question thus presented is whether or not writings which have been proven to be genuine are admissible in evidence for the sole purpose of providing a foundation for the comparison of handwriting. The statute, regulating the manner of proving the style of penmanship is as follows:

"The handwriting of a person may be shown, by any one who believes it to be his, and who has seen him write, or has seen writing purporting to have been his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting": B. & C. Comp. § 776.

"Evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered": B. & C. Comp. § 777.

In *Munkers v. Farmers' Ins. Co.* 30 Or. 211 (46 Pac. 850), Mr. Justice BEAN, speaking for the court in construing the section last quoted, settles the question raised by saying: "Under this statute it is clear that any writing which is admitted to be or treated as genuine by the party against whom the evidence is offered may be used for the purpose of comparison with the writing or signature in question, although it may not be admissible in evidence for any other purpose." See, also, 15 Am. & Eng. Enc. Law (2 ed.), 267, note 3. In *Holmes v. Goldsmith*, 147 U. S. 150 (13 Sup. Ct. 288: 37 L. Ed. 118), in interpreting the section of the statute last referred to, it was held that, when the genuineness of a paper sued on is put in issue, papers not otherwise competent may be introduced in Oregon for the purpose of enabling the jury to make a comparison of handwriting,

the court saying: "We regard the statute as constituting the law of the case, and as warranting the action of the court in the particulars complained of."

It was argued at the trial herein that a party against whom writings may be offered in evidence could have admitted or treated them as genuine without ever having written them himself, and as such manuscripts are received as a basis of comparison of penmanship, he might be convicted upon the authorized writing of a person who theretofore had been his clerk, and, this being so, the rule adopted in the cases referred to should not be applicable in the trial of criminal actions, and that the testimony of a witness that she discussed with the defendant the contents of a letter purporting to have been written by him to her is not sufficient evidence in a case of this kind that he wrote the letter, and hence the basis for the comparison necessarily fails, and the error in admitting such letter becomes manifest. The sections of the statute hereinbefore quoted relate to the same subject-matter and should be construed together. Considering these clauses in that manner, it is the genuine handwriting of the person against whom the evidence is offered, that has been admitted or treated by him as such, that must be taken to form the basis of comparison of penmanship, and not such documents as might be valid and binding on him, though written and signed by another at his request. The bill of exceptions discloses that Exhibits numbered 1, 2 and 5 were severally admitted and treated by the defendant as having been written by him, and that he subscribed his name to Exhibit No. 6. Exhibit No. 4 is as follows:

"Cottage Grove Or. June 28th—1903.

Dear Sister and family and all the rest of the folks.

We are all well except Roy he has the measles I hope you are all well I got my hay in the barn before the rain that is all I had cut it is raining now I have about 12 acres reasy to cut now Well I will tell you about me going to get married I shall marry on the evening of the 9 of July at (OClock I will let you no in time so you can make calculation on the 4 if you want to go You peopel can come up to me place and go to town in the evening or if you want to just come to Mrs Dowens and then

come on the next day We dont expect to have very many at our weding Come if you can rite and let me po if you are coming. Well I will close

Yours as ever

John T. Branton.

Send Mancey and nell Word."

It will be remembered that Mrs. Wetzel testified that after receiving this letter she discussed with the defendant the subject-matter and the contents thereof. She also testified that she had frequently seen him write and recognized his penmanship.

3. In *Manning v. State*, 37 Tex. Cr. R. 180 (39 S. W. 118), a witness testified that, though he had never seen the prosecuting witness write, he had received many letters from her, had talked with her about the contents thereof, and she admitted to him that she had written a letter to him. It was held that a letter exhibited to him was one received by mail from her, and the testimony was sufficient to identify the letter as a specimen of her handwriting, to be used for comparison with other letters claimed to have been written by her. It may well be doubted whether the rule thus announced would be applicable under a statute like ours, for a party might be able to repeat from memory the contents of letters or other documents which had been written at his dictation and signed by another person at his request, the penmanship of which would not afford a safe guide for comparison. To hold that an instrument written and signed under the circumstances assumed constituted a sample of chirography sufficient to determine therefrom the similitude of handwriting of another document might result in convicting the purported author of the first letter of forgery or of a similar crime that had been committed by his amanuensis in writing the second. The genuineness of papers must be clearly shown before a person can be permitted to testify to the handwriting of another (15 Am. & Eng. Enc. Law, 2 ed. 272), and there is now no distinction in this respect between civil and criminal causes (*Idem*, 253), unless otherwise specially provided by statute: B. & C. Comp. § 1399. The genuineness of handwriting was originally limited to the testimony of a witness who saw the

instrument executed, and his declaration in this respect was applicable only in civil actions: 3 Wigmore, Evidence, § 1991. An express admission of the genuineness of a writing by the purported author thereof renders it admissible in evidence as a basis for comparison of penmanship: B. & C. Comp. § 776. So, too, his treatment of the instrument as genuine, which is an implied admission to that effect, is equally competent: 1 Wigmore, Evidence, § 701; 3 Wigmore, Evidence, § 1993. Whether or not the defendant's acknowledgment of the contents of the letter announcing his intended marriage is such a treatment of the writing as to render it equivalent to an implied admission of the genuineness of his penmanship, we do not think it necessary to inquire; for it will be remembered that no comparison therewith was made by the expert witnesses. The letter having been offered in evidence, the jury, it is true, were authorized to make a comparison therewith (B. & C. Comp. § 777); but, their attention not having been directed thereto, we think, in view of the fact that so many genuine samples of the defendant's handwriting were received in evidence, that the admission of such letter caused no appreciable injury to his rights.

4. It is contended by defendant's counsel that no final judgment was rendered in this action. The transcript details the proceedings of the trial, sets out a copy of the verdict, states that the motion for a new trial was denied, declares that the defendant was unable to show any valid reason why sentence of the court should not then be pronounced, and concludes as follows:

"It is therefore ordered that the said defendant John Branton be confined in the penitentiary of the State of Oregon for the term of ten years, and that he pay the costs of this prosecution."

The word "considered," when used by a court to express the final conclusion reached on the trial of an issue, or on the admission or confession of a party, has been deemed appropriate; but other words have been held equivalent thereto: 1 Freeman, Judgments (4 ed.), § 46. This, when in a criminal action which condemns the prisoner to be punished and sets forth par-

ticularly the amount, duration and place of punishment, is a final judgment: 1 Freeman, Judgments. (4 ed.), § 21a.

No prejudicial error having been committed, and the judgment being sufficient, it is affirmed. **AFFIRMED.**

Argued 22 January, decided 5 March, 1907.

SEFFERT v. NORTHERN PACIFIC RAILWAY CO.

88 Pac. 962.

PLEADING—FORM OF GENERAL DENIAL.

1. The rules of pleading under statutes permitting general denials are reviewed and discussed.

PLEADING—SUFFICIENCY OF REPLY—WAIVER OF DEFECT.

2. A denial in a reply of "each and every allegation of said answer except such facts as are set forth in the complaint admitted by said answer," is equivalent to a denial of every allegation in the answer except as alleged in the complaint, and, if it is defective, it is not entirely bad, and objection thereto is waived by going to trial without question.

FINDINGS BY COURT—REVIEWING SUFFICIENCY OF EVIDENCE.

3. The appellate court will examine the evidence in an action tried without a jury only to the extent of determining if there is any competent support for the findings, it will not review the weight or sufficiency of the evidence.

From Columbia: **THOMAS A. MCBRIDE**, Judge.

Statement by **MR. JUSTICE EAKIN**.

This is an action by respondent, Ervin Seffert, against the Northern Pacific Railway Co. to recover the value of a cow killed by a train of the appellant at Deer Island Station. Respondent's cow was at large on the range with other cattle, and, at the time of the killing, was grazing on the side track of appellant at said station about 600 feet north of the south end of the side track, and about 200 feet north of a car standing on the side track. The south end of the side track is about a quarter of a mile north of the station. The train that struck the cow was the northbound passenger, running about 35 miles an hour. It did not stop at the station. **AFFIRMED.**

For appellant there was a brief over the name of *Carey & Mays*, with an oral argument by *Mr. Omar Corwin Spencer*.

For respondent there was a brief and an oral argument by *Mr. William Hamilton. Powell.*

MR. JUSTICE EAKIN delivered the opinion of the court.

1. After the evidence was taken, appellant's counsel moved the court for judgment on the pleadings for the reason that the denial of the reply is insufficient to put at issue the affirmative allegations of the answer. The denial of the reply is in the following words:

"Denies each and every allegation thereof except such facts as are set forth in this plaintiff's complaint admitted by said answer."

This is equivalent to a denial of each and every allegation of the answer except as in the complaint alleged. The answer to the complaint, after the denial, which is positive and general, by affirmative allegations, practically admits that the cow went upon the track, as alleged, and was killed, and would probably carry with it the further admission, inferentially at least, that the cow was killed by the appellant's train.

In *Veasey v. Humphreys*, 27 Or. 515, 518 (41 Pac. 8, 9), Mr. Justice WOLVERTON, in speaking of such defenses, says: "New matter pleaded under this statute, which goes to defeat the plaintiff's cause of action, logically speaking, if not expressly, admits by implication a real or apparent right in plaintiff to be thus avoided. Such a plea at common law was by way of confession and avoidance, in which the defendant had to give color to the plaintiff." To the same effect is *Watkins v. Southern Pac. Co.* (D. C.), 38 Fed. 711 (4 L. R. A. 239). The plaintiff here sought to qualify his denial contained in the reply, so as not to controvert matter alleged in his complaint. Denials should not be recklessly made, as they are made under oath equally with the affirmative matter, and they must be in accordance with the truth, and therefore, where the traverse is not intended to be complete (that is, some of the matters alleged are not controverted), the denial cannot be a positive denial, but must be qualified to conform to the truth.

There is a conflict in the authorities as to the sufficiency of

such a denial as the one in question here, a few states holding that it is a nullity, others that it is bad pleading, but must be remedied by motion to strike out or to make more definite, and if it is not so attacked the irregularity is waived. But the better rule seems to be that a general denial of each and every allegation of the complaint, except as hereinafter admitted, qualified or stated, is a proper form of denial, if the matters so excepted are so definite and certain as to make the issue plain. 1 Enc. Pl. & Pr. 803, after citing authorities on this conflict, says: "The weight of authority is in favor of allowing a general denial of all allegations not otherwise admitted. When there is no ambiguity in what is stated, admitted or qualified, and when the allegations of the complaint are so specific that there can be no mistake in ascertaining what is put in issue, and no difficulty in punishing the defendant if the verification is false, this form of denial is sufficient." And if the pleading taken as a whole leaves it doubtful or ambiguous as to what is denied, then it should be remedied by motion to make definite or to strike out: Bliss, Code Pl. (3 ed.), § 331a; *Ingle v. Jones*, 43 Iowa, 286; *Kingsley v. Gilman*, 12 Minn. 515 (Gil. 425); *Griffin v. Long Island R. Co.* 101 N. Y. 348 (4 N. E. 740); *Burley v. German-American Bank*, 111 U. S. 216 (4 Sup. Ct. 341; 28 L. Ed. 406).

2. Here the case had been previously tried in the justice's court on this reply, and, when the issues were made up in the circuit court, it was stipulated that the plaintiff's reply "should be considered as the reply to the answer to the amended complaint," and the form or sufficiency of it was not questioned until after the trial. This was too late. Such a denial, if defective, is not a nullity, but must be questioned by motion or demurrer before trial.

3. It is also claimed that there is no evidence in the record of any negligence on the part of the defendant. On appeal from a judgment on findings of the court in a case tried without a jury, the appellate court will not consider the testimony further than to ascertain if there was any competent evidence to

support the findings: *Salem Traction Co. v. Anson*, 41 Or. 562 (7 Munic. Corp. Cas. 701: 67 Pac. 1015, 69 Pac. 675). "The findings of fact of the trial court are conclusive on us if there was some competent evidence offered and admitted at the trial reasonably tending to their support, and, 'whether or not that court was justified by the weight of the evidence in making the findings, this court cannot consider': *Astoria Railroad Co. v. Kern*, 44 Or. 538, 542 (76 Pac. 14, 15). There was a conflict between the evidence for the plaintiff and that for the defendant as to whether or not the engineer made any effort to frighten the cow by the use of escaping steam, ringing the bell or whistling; whether the cow was in view of the engineer in time for him to check the speed of the train; and whether he made any effort to check its speed. There was some evidence tending to show negligence on the part of the defendant, but whether the weight of evidence justified the findings we cannot consider, and the judgment is affirmed. AFFIRMED.

Argued 23 January, decided 5 March, 1907.

HIGH v. SOUTHERN PACIFIC CO.

88 Pac. 961.

RAILROADS—LIMITS OF DEPOT GROUNDS—QUESTION FOR JURY.

1. Where the evidence is conflicting as to the extent of the space reasonably required for depot grounds at a given station, the question whether a particular point is within the depot grounds should be submitted to the jury.

RAILROADS—FENCING—VARIANCE BETWEEN PLEADINGS AND PROOFS.

2. An allegation that a railroad track was not fenced at a certain point, is not supported by proof that a gate was negligently left open in a fence theretofore constructed at that point.

PLEADING—REMEDY FOR COMMINGLED CAUSES OF ACTION.

3. Where several causes of action are confused in a complaint the proper practice is to move for an order requiring them to be separately stated, or that an election be made between them, and not to move to strike out parts of the pleading.

From Marion: JOHN B. CLELAND, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by M. M. High against the Southern Pacific Co. to recover damages for animals killed by a moving train.

The defendant operates a railroad from Portland to San Francisco, and has a right of way 60 feet wide through the grounds of the United States Indian Training School at Chemawa, upon which it maintains a depot or station for receiving and discharging freight and passengers. Chemawa is not an incorporated town, city or village, platted into lots and blocks, and there are no streets or alleys crossing the railway at that place. About 1,100 feet north of the depot a county road from the east crosses the track and right of way at right angles, and then turns north, running parallel with, and a short distance west of, the right of way for about 600 feet, when it again turns west. The defendant company originally maintained fences on both sides of the right of way north from the county road with gates therein at a farm crossing opposite where the county road turns to the west. A short time prior to the killing of the plaintiff's animals it extended its side track north, to within 20 or 30 feet of the farm crossing referred to, and removed the fence along the west side to that point, with a view of arranging for the receipt and discharge of freight north of the county road crossing. It did not, however, remove the fence on the east, but continued to maintain it as before, and the evidence tends to show that on the 9th of September, 1904, the animals of the plaintiff which were being pastured in an inclosure made by such fence escaped through the gate at the farm crossing, and were killed by a moving train.

The defendant had at the time from 50 to 75 employees living in box cars on a temporary siding near the gate through which it is alleged the animals escaped. These men had a tent, bake oven, etc., inside the inclosure, and used the gate for the purpose of passing in and out, and there was evidence tending to show that the gate was carelessly and negligently left open by them, and the animals thus allowed to escape. The complaint alleges that it was the duty of the defendant, under the statute, to fence its road at the point where the animals escaped, but that it had previously removed the fence on the west to extend its depot grounds; that the taking down of the fence and the

extending of the depot grounds were wholly unnecessary to the safe or convenient transaction of its business with the public, and was for its own private advantage; that no freight or passenger business whatever was transacted at or near the gate; and that defendant, in disregard of its duty to keep its track fenced at such point, failed and neglected to construct and maintain a fence on the west side thereof, or to maintain a gate to complete the farm crossing or keep closed the gate put in by it on the east side of such crossing, and permitted its servants, agents and employees to leave such gate open, by reason of which the horses escaped and were killed. The defendant moved to strike out that part of the complaint alleging negligence in leaving the gate open, but the motion was overruled, and the defendant answered, denying the negligence charged in the complaint, and alleging that the point where the animals entered upon the track was within its depot grounds and at a place it was not required to fence. The court below directed a nonsuit, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Carson & Cannon*, with an oral argument by *Mr. Anderson M. Cannon*.

For respondent there was a brief over the names of *W. D. Fenton, George Greenwood Bingham* and *Rufus Albertus Leiter*, with oral arguments by *Mr. Bingham* and *Mr. Leiter*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It is unnecessary to notice the evidence at length. It is sufficient that it tended to show that the animals escaped through the gate at the farm crossing, which it is claimed was carelessly and negligently left open by the employees of the defendant. The court below, following the line of authorities which holds that in actions of this character the extent of depot grounds is a question of law for the court, and not of fact for the jury, ruled that the gate referred to was within the depot grounds, and as a consequence defendant was not required under the statute to maintain a fence at such point. Since the trial in the court below we have had occasion to examine the question

thus presented, and the rule announced is that, where the evidence as to whether a given point constitutes a part of the depot grounds of a railway company is conflicting, or different inferences may be drawn from it, the question is for the jury, and not the court: *Wilmot v. Oregon Railroad Co.* 48 Or. 494 (7 L. R. A. [N. S.], 202: 87 Pac. 528).

Now, we think it cannot be said in this case that the evidence was so clear and undisputed that the court could declare as a matter of law that the place where the animals entered upon the track was within the depot grounds of the defendant. The gate through which it is alleged they escaped was about 1,700 feet north of the place where it received and discharged passengers and freight, and was north of a cattle guard put in by the defendant, probably as the northmost limit of its depot grounds, and there was evidence tending to show that it was not necessary for the convenience of either the company or the public that the right of way should be unfenced at that point. There was no evidence that the company contemplated using the east side of its track north of the county road crossing for the transaction of business with the public, or, indeed, that the track could be approached from that side except along the right of way. The link put in by it subsequent to the accident, and which is designed to be used in the shipment of freight, is 400 or 500 feet south of the farm crossing, and the evidence is at least conflicting as to whether it was either necessary or convenient for the public or the company that the track should remain unfenced at the point where the gate is located. And, moreover, the defendant built and was maintaining the fence and gate as a part of the inclosure in which plaintiff's animals were being pastured, and this was evidence tending to show that the defendant did not consider such place a part of its depot grounds.

2. The defendant claims that, if it was required to maintain a fence on the east side of its track at the place where the gate is located, it had actually done so, and therefore discharged any duty devolving upon it in that regard, and that the action is

based upon the statutory liability for a failure to maintain a fence, and therefore plaintiff cannot recover, even if it was negligent in allowing the gate to remain open. An allegation of a failure to fence is not supported by proof that a gate in a fence actually constructed was negligently left open: *Stonebraker v. Chicago & Alton R. Co.* 110 Mo. App. 497 (85 S. W. 631); *Megrue v. Lennox*, 59 Ohio St. 479 (52 N. E. 1022).

3. But, as we understand the complaint, the gravamen of the action is negligence in leaving the gate open and thus allowing the animals to escape from the inclosure and wander onto the track. The averment that it was the duty of the defendant to fence its track at the point where the animals escaped was matter of inducement and preliminary to the charge of negligence referred to. If there were, in fact, two causes of action stated in the complaint, the defendant should have moved for an order requiring them to be separately stated, if they could be properly joined, and, if not, to require plaintiff to elect upon which he would rely. The remedy was not by motion to strike out. The complaint, we think, clearly contains a cause of action for negligence in leaving the gate open, and, if it was at a point where defendant was required to fence and its being open was due to the negligence of the defendant, it is liable: 3 Wood. Railroads (Minor's Ed.), § 419; 3 Elliott, Railroads, § 1200; *Mooers v. Northern Pac. Ry. Co.* 80 Minn. 24 (82 N. W. 1085); *Chapman v. New York Cent. R. Co.* 33 N. Y. 369 (88 Am. Dec. 392); *Spinner v. New York Cent. R. Co.* 67 N. Y. 153.

Judgment reversed, and new trial ordered.

REVERSED.

Argued 12 February, decided 12 March, rehearing denied 21 May, 1907.

SAPPINGFIELD v. KING.

1 L. R. A. (N. S.) 1066; 89 Pac. 142, 90 Pac. 150.

DEEDS—DELIVERY—INTENTION.*

1. The delivery of a deed is a question of intention, and may be effected by any act or word manifesting an unequivocal intention to surrender the

*NOTE.—On the subject of What Constitutes a Delivery of a Deed, see monographic note in 53 Am. St. Rep. 537-556; note in 12 L. R. A. 171-177, on Delivery Essential to Transfer Title; extended note in 54 L. R. A. 865-910, Delivery of Deed to Third Person or for Record.

instrument so completely as to deprive the grantor of all authority over it or of the right of recalling it.

DEED—EFFECT OF TESTAMENTARY RECITALS.†

2. An instrument in the form of a deed reciting that it is made upon the condition that it shall take effect from and after the death of the maker is not a deed, since it does not presently transfer absolutely the property described, and title is not thereby conveyed, if the maker recalls it, even after it has been delivered and recorded.

WILLS—DEED DISTINGUISHED FROM WILL.

3. Plaintiff and her husband being aged, and she in bad health, and both desiring to make testamentary disposition of their property, she conveyed land to him, the deed to take effect on her death. At the same time the husband made a will, and both instruments were placed in an envelope and deposited by a third person in a bank, where they remained until the husband's death, when the will was removed. *Held*, that plaintiff had no intention to part with the control of the deed presently, and that it was testamentary and hence revocable.

ENFORCEMENT OF MUTUAL WILLS—EVIDENCE REQUIRED.**

4. Whatever may be held by various courts as to the validity of testamentary deeds and wills reciprocally executed for a valuable consideration, they are all agreed, and this court now holds, that the evidence must be full and convincing as to the terms of the agreement, and that the instruments in question were made with the mutual intention of complying therewith. The evidence in this case does not show even that there was an agreement.

SAME—CASE UNDER CONSIDERATION.

5. Where a husband and wife, advanced in years, and each owning separate property, agreed that they would have their wills made, and he made a will giving her a life estate in his property, and she conveyed her property to him, the deed to take effect on her death, but it does not appear that any agreement was made between them as to the terms of the will, or that one was to be the consideration for the other, a contention that the deed and the will were mutual and reciprocal and for that reason irrevocable, is without merit.

From Marion: WILLIAM GALLOWAY, Judge.

†For a case construing an instrument claimed to be a testamentary writing, see *Beebe v. McKenzie*, 19 Or. 296 (7 Am. Prob. Rep. 538).

As to whether a doubtful instrument is a deed, or a will, see *Hunt v. Hunt*, 68 L. R. A. 180 (with briefs); *McGarrigle v. Roman Catholic Asylum*, 1 L. R. A. (N. S.) 315, with briefs and note.

Read, also, *Wilson v. Carriso*, 49 Am. St. Rep. with note at pp. 219-222, Conveyance to Take Effect After Grantor's Death; *Brown v. Westerdale*, 53 Am. St. Rep. with note at pp. 553-556, Delivery of Deed on Contingency of Death; *Ferris v. Neville*, 89 Am. St. Rep. with monographic note, What Constitutes a Testamentary Writing, particularly pp. 494, et seq.; *Cady v. Upham*, 106 Am. St. Rep. 388, and note; *Grilley v. Atkins*, 112 Am. St. Rep. 152, with note.

**On the subject of the Validity and Probate of Joint and Mutual Wills, see *Gerbrick v. Freitag*, 2 A. & E. Ann. Cas. 24 with note.

Statement by MR. JUSTICE EAKIN.

This is a suit by Mary Sappingfield against Amanda King and others to quiet the title to real estate under Section 516 of B. & C. Comp. On February 1, 1897, plaintiff was the owner of the land in question, and her husband, John Sappingfield, owned other property. Plaintiff at that time was 77 years old and her husband 87. Plaintiff was in poor health, and both she and her husband were desirous of making provision for the disposition of their property after their death, and, after consideration of the same for some weeks, on February 1, 1897, they went to Salem, and in the office of M. W. Hunt plaintiff duly executed a deed to John Sappingfield, her husband, for the land in question for the consideration of love and affection and the sum of \$1, the operative words of which are: "Have bargained and sold and by these presents do bargain, sell and convey unto my husband." And following the description of the property is this provision:

"This deed is made with the full understanding and upon the condition that the same shall take effect from and after the death of the said grantor herein and it is understood and intended that this deed shall be recorded immediately after my death."

At the same time, and as part of the same transaction, the husband, John Sappingfield, made a will, disposing of all his property, the second clause of which is as follows:

"I hereby give and bequeath all the property of which I may die seized, to my wife, Mary Sappingfield, the same to be used by her during her natural life, and at her death, I hereby direct," etc.

While in Mr. Hunt's office, plaintiff and her husband talked together more or less about the matter in hand, and before plaintiff signed the deed it was read over to her and was then executed by her, and the will was executed by her husband. Both the deed and the will were left with Mr. Hunt, and they were by him inclosed in an envelope and placed in the bank, where they remained until the death of the husband in 1903, when

the will was removed, though the deed still remains there. The defendants in this suit are the heirs at law of John Sappingfield and legatees under the said will, and claim a residuary interest in such lands through said deed, and it is such claim by defendants that plaintiff seeks to have quieted. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. L. H. McMahan*.

For respondent there was a brief over the name of *Claire Moreau Inman*, with oral arguments by *Mr. Inman* and *Mr. Frank Alonzo Turner*.

MR. JUSTICE EAKIN delivered the opinion of the court.

This case turns upon the questions whether the deed, at the time of its execution, was delivered as a deed to John Sappingfield, and whether it conveyed any estate or interest presently to the grantee. Plaintiff and her husband evidently sought to arrange for the disposition of their property after their death. The whole transaction clearly discloses this, and there was no undue advantage taken of plaintiff in what was done. She evidently understood the nature of the transaction. But it was evidently the intention of both plaintiff and her husband that neither of the instruments should be operative until after the death of the maker. It is evident that at that time both thought that plaintiff was liable to die first, and she wanted her husband to have the benefit of her property as long as he lived, and the will of the husband protected the plaintiff to the same extent. The indorsement on the envelope in which the papers were left at the bank was not directed by them or either of them, and plaintiff is not bound by it. Plaintiff and her husband had the same purpose in this transaction, viz., that their property at their death should go to their children equally, taking into consideration prior advances to some of them. The heirs of the one were the heirs of the other, and this form of disposing of the property seems to have been adopted as preferable to two wills, and evidently from the whole transaction it was intended that both instruments should be subject to recall.

1. Delivery is a question of intention, and may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all authority over it or of the right of recalling it: *Payne v. Hallgarth*, 33 Or. 430, 437 (54 Pac. 162); *White v. White*, 34 Or. 141, 150 (50 Pac. 801, 55 Pac. 645); *Swank v. Swank*, 37 Or. 439 (61 Pac. 846). If the grantor does not evidence an intention to part presently and unconditionally with the deed, there is no delivery: *Walter v. Way*, 170 Ill. 96 (48 N. E. 421); *Pennington v. Pennington*, 75 Mich. 600 (42 N. W. 985). There was evidently no intention that either plaintiff or her husband should part presently with their property. Their purpose was one, viz., to protect each other in case of the death of one and the disposition of the property after the death of both, and that the title to plaintiff's property should not be affected while she lived, but that, when she died, it should pass by the deed to her husband, and that there was no intention on the part of the plaintiff or her husband that the possession of the deed should pass at once to the husband beyond the power of plaintiff to recall it.

2. The form of the deed, however, renders it testamentary, and therefore revocable at any time, even though delivered. This is the effect of the clause which provides:

"This deed is made with the full understanding and upon the condition that the same shall take effect from and after the death of the said grantor."

If the deed purported to convey or pass to the grantee a present interest in the property and the deed was delivered, then the deed was operative at once and beyond the recall of the grantor, notwithstanding the reservation of a life estate; but, where the instrument does not pass any present interest to the grantee, its effect is testamentary, and not that of a conveyance.

3. In *Turner v. Scott*, 51 Pa. 126, it was held that the words in an indenture, "And this conveyance in no way to take effect until after the decease of the said John Scott the grantor," limited the granting words to take effect only after the death

of the grantor, and they were necessarily revocable; and that "the doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will." In *Millican v. Millican*, 24 Tex. 426, 442, it is held that "voluntary dispositions of property by deed, which did not operate, and were not intended to operate, a present transfer of the property out of the donor, or to vest a present interest in the donee, but were made to take effect only after the death of the donor, were testamentary," and, if there is any doubt as to the intent of the grantor to pass the title presently, the circumstances surrounding the transaction may be looked to to determine that matter, but not to dispute the plain tenor of the instrument: *Evans v. Smith*, 28 Ga. 98 (73 Am. Dec. 751); *Gage v. Gage*, 12 N. H. 371; *McGee v. McCants* (S. C.), 1 McCord, 517. Here the parties contemplated an arrangement for the disposition of their property after the death of both, and the provision of the deed above quoted, together with the fact of the instrument being left in the hands of the scrivener without any direction as to its disposition, indicates no intention to deliver, and by its terms it is testamentary and is therefore revocable.

There are a few cases holding that such a deed is operative as such, and irrevocable even though it does not convey a present interest. *Wilson v. Carrico*, 140 Ind. 533 (40 N. E. 50: 49 Am. St. Rep. 213), construes such a deed as conveying an estate to commence *in futuro*; such an estate being expressly authorized by the Indiana statutes: Rev. St. Ind. 1881, § 2959. In *Shackleton v. Sebre*, 86 Ill. 616, 621, the conveyance is sustained as a deed on the theory of a covenant of the grantor to stand seized to the use of the grantee, and *Abbott v. Holway*, 72 Me. 307, is to the same effect. In Georgia the cases are very conflicting. *Sperber v. Balster*, 66 Ga. 317, holds such a deed conveys no present title and is testamentary, and in *West v. Wright*, 115 Ga. 277 (41 S. E. 602), the court holds to the contrary, although

there is a dissenting opinion on this one question. In *Lauck v. Logan*, 45 W. Va. 251 (31 S. E. 986), the opinion states the law to be that, "if the intention gathered from the whole paper is that no estate is to pass until the grantor's death, it is a will and not a deed." The deed in that case contained the words: "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner." As to the rule just quoted the court then says, "Though seeming to me to be unreasonable, it is intrenched behind many decisions through many years, and we cannot repeal it," and then proceeds to hold that the granting words must control, and the words of the deed above quoted reserve only a life estate in the grantor. In some of these cases the deeds were not executed with all the formality required for the execution of wills, and, if not valid as deeds, they were void for any purpose, and that was one of the controlling elements in upholding them as deeds. This is the case in Indiana, Illinois and Georgia.

But the greater weight of the authorities hold that, in determining whether such an instrument is a deed or a will, the main question is: Did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper, or, upon the other hand, did he intend that all the interest or estate should take effect only at his death? If the former, it is a deed; if the latter, it is testamentary and revocable. The language limiting the taking effect of the deed similar to that in the case here and as quoted from *Turner v. Scott*, 51 Pa. 126, has been held in the following cases to convey no present interest, but rendered the instrument testamentary and therefore revocable: *Gillham Sisters v. Mustin*, 42 Ala. 365; *Leaver v. Gauss*, 62 Iowa, 314 (17 N. W. 522); *Hazelton v. Reed*, 46 Kan. 73 (26 Pac. 450; 26 Am. St. Rep. 86); *Bigley v. Souvey*, 45 Mich. 370 (8 N. W. 98); *Conrad v. Douglas*, 59 Minn. 498 (61 N. W. 673); *Cunningham v. Davis*, 62 Miss. 366; *Murphy v. Gabbert*, 166 Mo. 596 (66 S. W. 536; 89 Am. St. Rep. 733); *Pinkham v. Pinkham*, 55 Neb. 729 (76 N. W.

411); *Turner v. Scott*, 51 Pa. 126; *Babb v. Harrison*, 9 Rich. Eq. 111 (70 Am. Dec. 203); *Armstrong v. Armstrong*, 4 Baxt. 357; *Carlton v. Cameron*, 54 Tex. 72 (38 Am. Rep. 620). Also there is a note to *Hazelton v. Reed*, in 32 Central Law Journal, 512, by Jesse A. McDonald, and a leading article by W. W. Thornton, of Indiana, in 19 Central Law Journal, 47, commenting on the case of *Leaver v. Gauss*, to the same effect. And, if the deed is in fact testamentary, even though it be delivered, it is revocable. Such is the case of *Turner v. Scott*, 51 Pa. 126, where it was delivered and recorded: *Pennington v. Pennington*, 75 Mich. 600 (42 N. W. 985); *Bigley v. Souvey*, 45 Mich. 370 (8 N. W. 98); *Conrad v. Douglas*, 59 Minn. 498 (61 N. W. 673); *Hannig v. Hannig* (Tex. Civ. App.), 24 S. W. 695. And we hold that plaintiff had no intention to part with the control of the deed presently, and, further, that the deed was testamentary and therefore revocable.

The decree of the lower court will therefore be affirmed.

AFFIRMED.

Decided 21 May, 1907.

ON MOTION FOR REHEARING.

MR. JUSTICE EAKIN delivered the opinion of the court.

4. The motion raises for the first time the question that the deed of plaintiff and the will of the husband are mutual and reciprocal wills based on a compact, and for that reason irrevocable. The most that can be said for these two instruments is that they are mutual and reciprocal, but each stands as an independent will unaffected by the other. Some authorities hold that in a case where such wills are executed in pursuance of an agreement based on a valuable consideration, after the death of one the will of the other is irrevocable; but in such a case the agreement must be certain and definite, and the court must have full and satisfactory proof of it: *Edson v. Parsons*, 155 N. Y. 555, 567 (50 N. E. 265).

In *Gall v. Gall*, 19 N. Y. Supp. 332 (64 Hun, 600), relating

to an agreement for a specific devise, the court say: "It is certain, however, that in this class of cases the ordinary rules which govern in actions to compel the specific performance of contracts, and which furnish reasonable safeguards against fraud, should be rigidly applied. These rules require that the contract be certain and definite in all its parts, that it be mutual and founded upon an adequate consideration, and that it be established by the clearest and most convincing evidence." In *Edson v. Parsons*, 155 N. Y. 555, 567 (50 N. E. 265), a case of an agreement for reciprocal wills, it is said: "I think it needs no further argument to show that to attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement which is relied upon to change its ambulatory nature, and that presumptions will not, and should not, take the place of proof."

5. Here the evidence shows that plaintiff and her husband were getting quite old. Each owned separate property. The plaintiff had been quite sick, and it was arranged that they would have their wills made; and this deed and the will were the result. There is no testimony disclosing that any agreement was made between them as to the terms of the wills, or that one was to be the consideration for the other. There is nothing in the evidence to show that the wills were made in fulfillment of the terms of any contract or agreement, and the motion is denied.

AFFIRMED.

Argued 30 January, decided 19 March, 1907.

PACIFIC TELEPHONE CO. v. SALEM.

89 Pac. 145.

PRACTICE IN GRANTING INJUNCTIONS—BURDEN OF PROOF.

1. Courts will proceed cautiously in granting injunctions and should not grant them at all in doubtful cases, the burden of proof being with the plaintiff.

SAME—CASE UNDER CONSIDERATION.

2. A city granted to plaintiff, a telephone company, the right to use the streets and alleys for 50 years, the wires to be strung on poles above ground or laid under ground, as plaintiff might elect, in consideration of which the city was to use the poles, etc., free for fire alarm purposes, and

plaintiff was to furnish the fire department and city officers with telephones without charge. Thereafter, in settlement of a dispute, it was agreed between plaintiff and the city that plaintiff should pay the city \$200 annually for 10 years during which the city should not grant any franchise for a telephone system on terms more favorable than those granted plaintiff. During the term the city granted defendant a 25-year franchise; it being required that all lines and wires except house wires be placed under ground, and that defendant after the first year should pay 1 per cent on its gross annual receipts to the city, furnish and keep in repair five telephones for the use of the city, and that defendant should not, without the consent of the city, transfer the franchise or plant. *Held*, that an injunction would not issue to restrain defendant from acting under the franchise, as under the facts it was doubtful as to which franchise was the most favorable.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit for an injunction by the Pacific States Telephone & Telegraph Co. against the City of Salem and Chas. E. Sumner. In 1884, the City of Salem granted to George S. Ladd, his associates and assigns, a 50-year franchise to erect, maintain and operate in the city a telephone system, and to use the streets, alleys and thoroughfares therefor, the wires to be strung on poles or other fixtures above ground or laid under ground in pipes, as the grantee might elect, in consideration of which the city was to use the poles and conduits free for fire alarm and police telegraph, and the grantee was to furnish the fire department with telephones in the engine houses and in the city hall free of charge. The plaintiff is the successor in interest of Ladd. In 1901, a controversy arose between it and the city respecting certain fees or taxes, in the settlement of which it was agreed that the company should pay to the city \$200 annually for 10 years, and the city should not during such term grant any franchise for a telephone system upon terms more favorable than those under which plaintiff operated and maintained its system. In November, 1905, the city council granted to the defendant Sumner a 25-year franchise for a telephone system, requiring that all main lines and wires (except necessary feed and house wires) within the fire district be placed under ground, and that the grantee should, after the first year, pay to the city 1 per cent on its gross annual receipts, and was

also to furnish, maintain and keep in repair five telephones for the use of the city. It was also provided that the grantee, or the corporation organized for the purpose of carrying on the telephone business, and to which he might assign the franchise, should not, without the consent of the city, sell or transfer the franchise or plant, and should not at any time enter into any contract, directly or indirectly, with any person, firm or corporation, concerning the rates to be charged for telephone service. The grantee was also required to give to the city a bond in the sum of \$5,000, conditioned that he would, within 18 months, have in operation not less than 400 telephones. A few days after the granting of the franchise, this suit was commenced by the plaintiff against the city and Sumner, to enjoin the latter from constructing, maintaining or operating his proposed system, on the ground that the franchise granted to him was more favorable than the one under which the plaintiff is operating, and therefore in violation of the contract referred to between it and the city. Upon the trial the suit was dismissed, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Charles Henry Carey* and *Carson & Cannon*, with oral arguments by *Mr. Carey* and *Mr. John A. Carson*.

For respondents there was a brief over the names of *Alexander King Wilson*, *O. A. Neal* and *A. O. Condit*, with an oral argument by *Mr. Wilson*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. An injunction is an extraordinary remedy, and will not be granted when the evidence is so conflicting as to make the right to it doubtful: *Taylor v. Welch*, 6 Or. 198; *Tongue v. Gaston*, 10 Or. 328. "The burden of proof," says LORD, J., in *Tongue v. Gaston*, "in such case being on the plaintiff, he must clearly establish the essential allegations of his complaint."

2. The plaintiff grounds its right to the relief on the contention that the franchise to Sumner is more favorable in its terms than the one under which it operates. The burden of proof is

upon it to establish this fact by satisfactory evidence, and this, in our opinion, it has not done. The two franchises differ so essentially that it is practically impossible to determine with any degree of certainty whether one is more favorable than the other. The plaintiff's franchise is for 50 years, the defendant's for 25. The plaintiff may support its wires on poles within the fire district, while the defendant is compelled to put his under ground, which is admittedly more expensive. The plaintiff has to furnish three telephones, and the defendant five. The plaintiff has to pay \$200 a year for 10 years, and the defendant 1 per cent on gross receipts during the lifetime of the franchise, except for the first year. The principal contention of the plaintiff is that the payment of \$200 a year for 10 years is more burdensome than the payment of 1 per cent on the gross receipts of the defendant for 24 years; but this necessarily depends upon so many future contingencies that any consideration of the question is mere conjecture, and too speculative to justify a resort to the extraordinary remedy of injunction.

The decree is affirmed.

AFFIRMED.

Argued 17 January, decided 26 February, 1907.

GROESBECK v. GROESBECK.

88 Pac. 870.

FRAUD—CASE UNDER CONSIDERATION.

1. The evidence is ample to sustain the finding of the trial court that the deed executed by S. V. Groesbeck and wife to T. J. Groesbeck on April 2, 1902, was induced by fraud and undue influence and while S. V. Groesbeck was so mentally incapacitated as to be incapable of understanding his conduct, and said deed was properly canceled at the suit of the other children of S. V. Groesbeck.

CANCELLATION OF INSTRUMENTS—NEED OF RETURNING CONSIDERATION.

2. The object of returning the consideration received before setting aside a transfer for fraud is to place the parties as they were before the occurrence, and where the grantee has received during his possession an amount equal to what he paid, there is no occasion to return the consideration as a condition precedent to maintaining suit.

From Union: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit for a decree declaring the plaintiffs Nicholas O. Groesbeck, Mary E. Packard, Jacob A. Groesbeck and Charles D. Groesbeck, each to be the owner of an undivided one-sixth interest in certain real property in Union County, and that the defendant holds the legal title to such interests in trust for them. The plaintiffs and defendant are the heirs at law of Stephen V. Groesbeck, deceased. In the spring of 1901, Mr. Groesbeck, at the solicitation of his children, sold 40 acres of land in Utah, and, through the agency of the defendant and one of the plaintiffs, invested the proceeds in a farm in Union County. At the time of this transaction, Mr. Groesbeck was about 75 years of age, well advanced in senile decay, and for three or four years had been practically incapacitated for the transaction of business. The sale of the Utah property, and the investment in Oregon, were made with a view of acquiring a larger tract of land which his children thought could be subdivided so as to afford homes for all of them. Soon thereafter some of the children moved to this state, took possession of the property, and stocked it with money furnished by their father. In July, 1901, the defendant moved to Oregon, and the father in October of the same year. The children seem to have been unable to agree among themselves, as a consequence of which all of them left the farm in the fall and winter of 1901, except the defendant and his brother, Thomas J. Groesbeck. In April, 1902, Stephen V. Groesbeck and his wife conveyed the farm to the defendant and his brother Thomas, subject to a mortgage of \$3,800. Thomas thereafter conveyed his interest in the farm to the defendant, who, with his wife, on February 20, 1903, sold and conveyed it to Ruckman, subject to the mortgage, for the sum of \$3,770, which, on the 21st of April following, they invested in the land now in controversy. Thereafter, Stephen V. Groesbeck and his wife having died, this suit was commenced for the purposes stated.

The complaint charges that the deed to the defendant and his brother was without consideration, and its execution was in-

duced by fraud and undue influence. For an answer to the complaint the defendant avers that for some years prior to the conveyance in question, he supported and maintained his father and mother, and looked after their property, and that the deed to him and his brother was made in consideration of such fact, and of the further agreement on their part to support and maintain their parents during the remainder of their lives, which agreement had been fulfilled. The plaintiffs had decree in the court below, and the defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Charles Edgar Cochran* and *Crawford & Crawford*, with an oral argument by *Mr. Cochran*.

For respondents there was a brief with oral arguments by *Mr. Ira Everett Barber* and *Mr. John Wesley Knowles*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. We are of the opinion that the decree should be affirmed. The evidence shows that prior to his removal to Oregon, and until his death, Stephen V. Groesbeck was in an advanced stage of senile decay, which, if it did not incapacitate him from intelligently transacting business, rendered him easily susceptible to the influence of those associated with him; that after the removal to Oregon, and after making it so disagreeable for the other children that they felt compelled to leave the place, defendant conceived the idea of obtaining a deed to himself and his brother Thomas for the Oregon property, and the circumstances under which such deed was made are thus related by Thomas:

"After John and I got the place to farm, and the other children got out and off of there, John proposed that we make father deed the place to us, as the other children were doing nothing to support the old folks, and we had them to take care of. There was some considerable talk like this, and finally, about April 2, John went to La Grande and got Sargent to come out and make the deed, and he did, and father and mother signed it. Father did not know what he was doing when he signed it; really, he did not sign it. Sargent took his hand and pushed

it along and made the signature. * * About a month or more before this first deed was made, he [defendant] began to ask father to deed to us, or, rather, to demand that he do it. Father did not seem to want to make it, and John would curse and abuse him and threaten him, handle him rough, and kept this up till along about the 1st of April, 1902, when father got mighty sick, and it looked like he was going to die. Then John said, 'I must get this deed fixed, father is liable to die any minute,' and, with an oath, said, 'if he dies the heirs can come in here and kick us off.' This was just before he brought Sargent and got the deed fixed. We paid Sargent \$25 to come out and fix it, and, after we got the deed, John seemed well pleased, and said, 'We've got them by the heels now, and got a downhill pull, and see them get it if they can.' He talked a good deal like that, and seemed to have it on his mind quite a good deal. He said to me, 'You stay with me, and I'll fix you; but G—d d——n the rest.' This was shortly after the deed was made. * * John would demand a deed, and father would say, 'No,' or, much of the time, say nothing at all, and John would curse him and threaten to throw him out and go off and leave him, and kept this up till he got the deed to me and him. * *

"When father made deed to us, he was very sick, and we thought he was going to die soon. John and I both talked about it. He was barely able to sit up, and did not appear to have any idea of what was being done. He had gotten worse in his mind right along all the time since coming to Oregon, and some time after that, when it was talked about, said to me that he had not deeded the place to me and John, or to any one. * * I heard John talking to father most every day before the deed was made for a month. Heard their talk, and the only things said were asking for a deed, and demanding a deed, to which father seldom said anything. The only support talk was what John said to me as a reason for getting the deed. * * I know that the matter of support and maintenance never entered into the consideration for any deed father made in this matter. He was simply made to deed, and that is all there was to it. * * I was there all the time. Heard and saw all, or most all, the talk; and, if there had been such consideration, I would have known it. * * There was no consideration whatever moved from either myself, or my brother, the defendant, for the making of either of the deeds mentioned in this case. We were on father's farm, stocked with his money, receiving all the benefits save the little he got, and were better fixed to make money and get along than

we had been for many years. * * I bargained the interest I had in it to my brother John W. for \$600, and he agreed to pay me this amount, but he never paid it, or any part of it. He did pay me \$125 when I left there, which, I understood, was pay for work on the place in farming it, and which he may have called on the deed. In buying my interest, he counted it as a one-sixth interest."

The testimony of Thomas Groesbeck concerning the defendant is corroborated by the testimony of other witnesses. Drs. Smart and Dunn, both of whom were acquainted with the elder Groesbeck while he resided in Utah, testified that for a period of three years or thereabouts, prior to his removal to Oregon, he had been in a condition of senile decay, and was a mental and physical wreck, without capacity to understand or intelligently comprehend the transaction of business. Dr. Richardson, a physician who saw him often a short time prior to the execution of the deed to the defendant, testified that he was then in an advanced stage of senile decay, and in such a mental condition as incapacitated him from the transaction of business. There are many other witnesses, intimate acquaintances, and relatives of the family, who testified to the same effect. Capitola Gunderson, I. C. Packard, E. L. Boren, Eldora Groesbeck and others testified to defendant's treatment of his father, and the influence he had over him. Under these circumstances it is clear that the deed executed by the elder Groesbeck to the defendant and his brother Thomas should be set aside and avoided by a court of equity: *Irwin v. Sample*, 213 Ill. 160 (72 N. W. 687); *Giles v. Hodge*, 74 Wis. 360 (43 N. W. 163).

2. It is argued, however, that before the plaintiffs can recover in this case they must do equity by repaying to the defendant the amount of the mortgage on the farm, and a reasonable compensation for the care and support of his father and mother after the execution of such deed. There is no evidence that the defendant paid or discharged the mortgage referred to. The land was conveyed by him to Ruckman, subject to the mortgage, and it was only that part of the consideration over and above the amount of the mortgage which was received by him and in-

vested in the property now in controversy. The defendant had the use of the farm, and received the rents, issues and profits thereof, which, so far as the record in this case discloses, were amply sufficient to compensate him for the support and maintenance of his father and mother.

The decree of the court below is affirmed. **AFFIRMED.**

Mr. Justice EAKIN, having presided at the trial in the court below, took no part in this decision.

Argued 22 January, decided 12 March, 1907.

MORSE v. ODELL.

89 Pac. 139.

PUBLIC LANDS—SELECTION OF INDEMNITY SCHOOL LANDS—CONTRACT.

1. When the selection by a state of indemnity school lands has been approved and certified, the title thereto vests in the state if the general government is the owner of the premises, and the approval exhausts the bases offered in exchange, and hence the furnishing of a list of such lands is no defense in an action to recover money paid defendant to furnish a list of school lands, which, because of their mineral character, would entitle the state to select others in lieu thereof.

APPEAL—HARMLESS ERROR—PLEADING—STRIKING OUT.

2. Where a defective defense which should have been attacked by demurrer is struck out on motion and no injury results, the error is not prejudicial.

IMPROPERLY SUSTAINING DEMURRER—WHEN HARMLESS.

3. Where a demurrer to a defense is erroneously sustained, but the evidence which would have been admitted to sustain the defense is admitted in connection with another issue, the error is harmless.

PLEADINGS AND PROOFS—RELEVANCY OF TESTIMONY.

4. In an action to recover money paid on a contract where plaintiff alleges that defendant agreed to repay the money received in case of non-performance on his part, and this allegation is denied in the answer, evidence that after the contract was executed defendant promised to repay the money is admissible.

WITNESSES—SCOPE OF CROSS-EXAMINATION.

5. There is no error in refusing to allow a witness to be cross-examined as to a matter to which his direct examination does not relate.

BREACH OF CONTRACT—DUTY OF OFFERING TO PERFORM.

6. In an action to recover money paid on a contract with defendant to furnish a list of school lands, which, because of their mineral character, would entitle the state to other lands in lieu thereof, plaintiff having alleged a failure to furnish a valid list of lands and defendant having alleged that, if the list furnished proved invalid, he was to substitute

other lands, which allegation plaintiff denied, the burden of proving this feature of the contract is on defendant, and it is his duty to offer to perform, and not that of plaintiff to demand, it.

PUBLIC LANDS—CONCLUSIVENESS OF RULING OF LAND DEPARTMENT.

7. Although ordinarily the doctrine of *res judicata* applies to the final decisions of the Land Department of the United States. it will not apply where the proceedings are irregular, and in such cases the Commissioner of the General Land Office may review a decision of a predecessor.

PUBLIC LANDS—COMPETENCY OF EVIDENCE AS TO PROCEEDINGS ON BEHALF OF THE STATE IN THE GENERAL LAND OFFICE.

8. An agent of the state whose duty it is to attend to matters relating to selection of lands in lieu of mineral school lands is competent to prove that no further evidence was offered in, and no appeal taken from, decisions of the General Land Office, relating to such selections, and his evidence is admissible in an action to recover money paid to one who agreed to furnish a valid list of such lands, but whose list was rejected by the General Land Office.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by W. B. Morse against W. H. Odell to recover money. The complaint states, in effect: That the defendant represented to the plaintiff that he could furnish information as to certain school lands containing mineral, which tracts could be used by the State of Oregon as bases for the selection of other parcels of equal area in lieu thereof; that such choice, when exercised, would be approved by the Commissioner of the General Land Office, thereby vesting the title to the indemnity lands in the state, from which they could be obtained by purchase, and that, if the base which the defendant could supply was not good and upon which valid indemnity selections could be made, he would repay plaintiff any sum of money that might be given him on account thereof; that about March 12, 1900, the defendant received from plaintiff \$640, pursuant to an agreement, to supply him with 640 acres of valid base, and thereupon furnished him a description of the following lands: The N. E. $\frac{1}{4}$ of section 36, in township 12 S., of range 39 E. of the Willamette Meridian, the E. $\frac{1}{4}$ of section 16 in township 8 S., of range 35 $\frac{1}{2}$ E., and the S. E. $\frac{1}{4}$ of section 36, in township 8 S., of range 34 E.; that in lieu thereof the State of Oregon selected, as indemnity school lands, the follow-

ing premises: The S. W. $\frac{1}{4}$ of section 18, in township 4 N., of range 3 W., the W. $\frac{1}{2}$ of section 19, and the S. E. $\frac{1}{4}$ of section 18, in the township and range last mentioned, which lands were to be conveyed by the state, at plaintiff's request, to Ethel C. Morse, M. M. Cusick and W. A. Cusick, respectively; that application was made by the state for the real property so selected, but the choice was rejected by the Interior Department of the United States, on the ground that the base furnished was invalid because of the failure of the state to prove the mineral character thereof, and that neither the plaintiff nor any of the persons named, to whom the indemnity lands were to have been conveyed, ever obtained a title to any part thereof, whereby the plaintiff became entitled to a repayment of the sum of money stated and interest thereon.

The answer denied the material allegations of the complaint, and for a first separate defense averred, in substance, that in consideration of the sum of money stated, which is admitted to have been paid, the defendant agreed to furnish the plaintiff with what he believed to be valid base, but, in case it should fail or be invalid, he would endeavor to substitute other sufficient base therefor; that the defendant furnished as base a description of the real property specified as such in the complaint, which he then believed to be good and valid mineral base, in lieu of which the State of Oregon might select indemnity school lands; and that the base so furnished was good and valid. For a second defense it is substantially stated that application was made by the state for the indemnity lands described in the complaint in lieu of the base furnished, and on February 20, 1904, while the petition was pending before the Department of the Interior, the Governor of Oregon, at plaintiff's request, withdrew the indemnity selection and waived the claim of the state to the lands so chosen, which was done to enable the plaintiff to secure the title thereto directly from the general government, thereby preventing a favorable decision by the Department of the Interior. For a third defense it is averred, generally, that about April 12, 1897, the lands so furnished as base were on the appli-

cation of the State of Oregon to select indemnity lands duly adjudged by the Commissioner of the General Land Office to be mineral base, and, no appeal having been taken from the decision, it became final; that no part of the base so determined to have been valid had been used as such, nor had any selection of indemnity lands been made in lieu thereof prior to the time when the defendant gave to the plaintiff the description of the real property mentioned. A motion to strike out the third defense having been allowed, on the ground that it was redundant, and a demurrer to the second sustained, for the reason that the facts stated therein did not constitute a defense, the remaining allegations of new matter in the answer were put in issue by the reply, and, a trial being had, judgment was rendered against the defendant as demanded in the complaint, and he appeals. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

AFFIRMED.

For appellant there was a brief over the names of *John Wilkins Reynolds* and *Mr. Alva O. Condit*.

For respondent there was a brief over the name of *Carson, Adams & Cannon*.

MR. JUSTICE MOORE delivered the opinion of the court.

It is contended that errors were committed in striking out the third defense and in sustaining a demurrer to the second. The defendant's counsel argue that the third defense was in the nature of a plea of former adjudication by the tribunal having jurisdiction thereof, and that the statement of facts in the second defense was sufficient to defeat the action, for the reason that the breach of the contract assigned in the complaint was superinduced by the plaintiff's voluntary act. We will first consider the third defense.

1. A rule of the General Land Office of the United States, in force when the alleged adjudication of the mineral character of the base was rendered, required that all applications for the selection of indemnity school lands should be so presented that the tract chosen might be connected with a specific part of the

public domain as the basis of the selection: Circular of July 23, 1885, 4 Land Dec. Dep. Int. 79. When the selection of indemnity school lands has been approved and certified, the title thereto vests in the state, if the general government is the owner of the premises (*Tenner v. O'Neill*, 15 Land Dec. Dep. Int. 559), and as a corollary from this legal principle it must necessarily follow that the base offered in exchange by the selection is exhausted by the approval. As the alleged adjudication of the validity of the base specified is equivalent to a statement of the approval of an indemnity selection in lieu thereof, the real property lost to the state in section 16 or 36, by reason of its mineral character, could not again be used for that purpose, and, this being so, that part of the answer stricken out did not state facts sufficient to constitute a defense to the action if the United States was the owner in fee of the indemnity school land chosen. The averment to which the motion was directed does not negative such ownership.

2. The defect in the pleading, however, should have been attacked by demurrer, but, as no injury could have resulted from the course pursued, the error, if any, was not prejudicial.

3. The second defense averred that, while the selection of indemnity school lands was pending before the proper tribunal, the Governor of Oregon, at plaintiff's request, withdrew such choice and waived the state's right thereto, thus preventing a favorable decision on the application. If the defendant was prevented from making as complete a defense as he might have otherwise done, if the demurrer had not been sustained, the judgment should be reversed. Evidence of the request for a relinquishment of the right of the state to the indemnity school lands was received on the assumption that the issue as to the validity of the base made it material, and, this being so, we do not think any prejudice resulted from the mode of trial adopted.

4. It is contended that error was committed in permitting testimony to be introduced, over objection and exception, tending to show that after the contract relied upon was executed the defendant made distinct promises to repay plaintiff the money

which he had received. It was alleged in the complaint that the defendant agreed to repay the money in case the base which he furnished should prove invalid; and, this averment having been denied in the answer, the testimony so objected to was pertinent as tending to establish the terms of the contract relied upon for a recovery: *Manary v. Runyon*, 43 Or. 495 (73 Pac. 1028).

5. The plaintiff as a witness in his own behalf was asked on cross-examination if the contract sued upon was not made with the State of Oregon to enable him illegally to obtain from it the land selected as indemnity; but, an objection to the inquiry having been sustained and an exception allowed, it is insisted that an error was thereby committed. The statute limits the quantity of land that can be purchased from the state by any person, and requires him to make affidavit as to certain facts respecting his qualification as a condition precedent to the right to secure a title to such lands: B. & C. Comp. § 3302. The transcript shows that the persons to whom the state was to convey the lands selected were related by marriage to the plaintiff, but we do not think it can be inferred from an examination of his testimony, which has been sent up, that he had entered into a contract with them to violate the law, and, unless such deduction reasonably follows from the direct examination of the witness, no error is committed in refusing to permit him to be cross-examined on the subject: *Pacific Livestock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422, 65 Pac. 597).

It is maintained that error was committed in refusing to permit the defendant's counsel to cross-examine the plaintiff and his father-in-law, Dr. W. A. Cusick, as to the interest of either in the cause of action, or to the money sought to be recovered herein. As no testimony was given by these witnesses on that subject in their direct examination and no issue made in relation thereto, no error was committed as alleged.

6. It is claimed that the court erred in refusing to allow the defendant to testify as to whether or not the plaintiff had ever requested him to supply other base than that which he furnished. The answer alleged that, if the base which was supplied should

fail or be invalid, the defendant would try to substitute other base therefor, which averment was denied in the reply. The burden of proving the defendant's theory in this respect was therefore imposed upon him, and it became his duty to make such endeavor, and it was not incumbent upon the plaintiff to demand other base when that which he procured failed.

7. It is insisted that an error was committed in denying a motion for a judgment of nonsuit. The transcript shows that the State of Oregon, on March 10, 1900, filed in the local land office at Oregon City, list No. 380, whereby it selected certain indemnity school lands in lieu of the premises used as bases therefor, a description of which is set out in the complaint. Pursuant to a stipulation of the parties, there were offered in evidence copies of letters written by the Commissioner of the General Land Office at Washington, D. C., or by his assistant, to the local land officers in Oregon, relating to the lands referred to herein as base, and copies of notices given in obedience to directions contained in such letters, addressed to agents of the State of Oregon having charge of its lands. These letters relate to the rejection of indemnity selections of school lands in consequence of the failure of the state to prove that the premises alleged as mineral were of that character. The letters referred to specified the time, usually 60 days after notice thereof, in which to supply such evidence, or to appeal from the order, in default of which the selection, which had been suspended, would be canceled without further notice. The premises so rejected for the reason stated, the lists in which the lands were included, and the time of giving the notices to the agents of the state are as follows: The N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, the S. $\frac{1}{2}$, and a deficit of 14.55 acres in the N. W. $\frac{1}{4}$ of section 36, in township 12 S., of range 39 E. of the Willamette Meridian, list No. 287; November 15, 1897. A deficit in the S. E. $\frac{1}{4}$ of section 36, in township 8 S., of range 34 E., list No. 114; November 6, 1895. A deficit in section 16, in township 8 S., of range 35 $\frac{1}{2}$ E., list No. 99; December 13, 1897. The E. $\frac{1}{2}$ of section 16, in township 8 S., of range 35 $\frac{1}{2}$ E., list No. 280, the schedule involved herein; Oc-

tober 17, 1902. And the N. E. $\frac{1}{4}$ of section 36, in township 12 S., of range 39 E., list No. 380; February 9, 1904. The rejection last noted states that the premises therein described had been adjudged mineral April 12, 1897.

The decision thus set aside is evidenced by a copy of a letter from the Commissioner of the General Office, of the date last mentioned, addressed to the register and receiver of the local office at La Grande, which states that their conclusion on the application of the State of Oregon to prove that certain lands in school sections were mineral, whereby they determined that all of section 36, in township 12 S., of range 39 E., was of that character, was affirmed. This letter does not refer to any list of lands that had been selected by the state as indemnity under a separate and distinct number, nor was the land so described therein that the tract selected might be connected with a specific subdivision of a section as the basis of selection as required by circulars issued by the Secretary of the Interior: 4 Land Dec. Dep. Int. 79; 24 Land Dec. Dep. Int. 548. Though the rule *res judicata* is applicable to final decisions rendered by the Land Department of the United States when called in question by the same parties upon a subsequent application for the identical public land pursuant to the law theretofore invoked (*Southern Pac. R. Co. v. Burlingame*, 5 Land Dec. Dep. Int. 415; *Blodgett v. Central Pac. R. Co.* 6 Land Dec. Dep. Int. 309), irregularity of proceeding warrants the Commissioner of the General Land Office in reviewing the decision of his predecessor: *Graham v. Hastings, etc., Ry. Co.* 1 Land Dec. Dep. Int. 362.

8. The decision of April 12, 1897, which was relied upon in the third defense, having been set aside by a successor in office June 13, 1903, in rejecting a part of indemnity selection No. 380, it must be taken for granted that the prior adjudication was considered irregular probably on the ground of a failure to comply with the rules prescribed by the Secretary of the Interior as hereinbefore indicated. When the indemnity school selection involved herein and evidenced by list No. 380 was filed, it had been determined by the proper tribunal, as to all the land

specified in that schedule as mineral, that the state had failed to prove such character of the premises, except as to the N. E. $\frac{1}{4}$ of section 36, in township 12 S., of range 34 E., and as to the land last mentioned the same conclusion was reached June 13, 1903, in setting aside a former adjudication in relation thereto, but no notice of the suspension or of the right to appeal from the order was given the agent of the state until February 9, 1904, and prior to the expiration of the time limited the Governor relinquished the state's claim thereto. The plaintiff's money was paid to the defendant in consideration of securing a title from the State of Oregon for the indemnity school lands selected, as described in list No. 380, to obtain which the base mentioned, as an equivalent therefor, must have been valid, and, as the contract was entire, a failure of any part of the base was such a breach of the conditions of the agreement as to warrant a relinquishment of the state's right to the only apparent valid base before the expiration of the 60 days allowed in which to offer further proof of its mineral character. No error was committed in denying the motion for a judgment of nonsuit.

The decisions adverted to permitted the State of Oregon to submit further evidence of the mineral character of such lands within a stated time, or to appeal from the orders; but, failing to do either, the adjudications would become final. Oswald West, an agent of the state, whose duty it was to supervise these matters, having been called as plaintiff's witness, was permitted, over objection and exception, to testify that no further evidence had been offered as required, nor had any appeal been taken. As this agent was competent and his testimony material, no error was committed in admitting it.

Other alleged errors are assigned; but, deeming them immaterial, the judgment is affirmed.

AFFIRMED.

Argued 26 February, decided 19 March, 1907.

PICKETT'S WILL.

89 Pac. 377.

WILLS—ELIGIBILITY OF WITNESS TO BENEFICIAL APPOINTMENT.

1. Under Section 5564, B. & C. Comp., providing that if any witness to a will shall receive thereunder any beneficial appointment affecting any property passing under the will it shall be void, a provision in a will appointing a certain attorney to assist the executor in settling the estate neither gives nor makes to such attorney any beneficial appointment of or affecting any real or personal estate so as to affect his qualification as a witness, since it is merely advisory.

EXECUTORS AND ADMINISTRATORS—SELECTION OF ATTORNEY.

2. The appointment of an attorney to advise an executor is a matter entirely personal to such officer, and he is not bound by any provisions or suggestions in the will.

WILLS—EXECUTION BY ANOTHER FOR A BLIND TESTATOR.

3. The signing of a will for a blind person by another at the request of the testator, where the latter can hear and speak and is present, is sufficient; and the same rule applies to the witnessing.

WILLS—BURDEN OF PROOF IN PROBATING.

4. In probating a will in both common and solemn form the burden of proof is on the proponent to establish the testamentary capacity of the testator and the regular and free execution of the document presented for probate.

MENTAL CAPACITY—CASE UNDER CONSIDERATION.

5. The testator who executed the will under consideration was 68 years old, blind, and in gradually failing health from a progressive hardening of the arteries which resulted in physical prostration, owing to inability to control any muscles, and a gradual failure of mind followed by death from want of arterial blood. It appeared, however, by the positive testimony of persons present, that at the time the will was executed testator was in possession of his mental faculties, recognized the persons present and stated that he knew the contents of the will and was satisfied with it. Opposed to this was the testimony of his physician and of medical experts that he could not at that period of his sickness have had mental power to know what he owned or who were his natural beneficiaries, unless the property was of such a nature as to be easily divided among a few persons. Positive reliable testimony of what actually occurred seems more convincing than opinion testimony that such an occurrence was impossible, and it is the conclusion of the court that the testator had testamentary capacity, notwithstanding his debilitated condition.

WILLS—EVIDENCE OF UNDUE INFLUENCE.

6. In view of the positive nature of the testator, that in framing his will he carried out a plan stated long previously, and that there is no direct testimony of any attempt to influence him, it must be concluded that the will in question is the product of his unrestrained wish and is valid.

WILLS—COSTS ON APPEAL.

7. In view of the outcome of this contest the costs and disbursements of the appeal will be assessed against the appellants, who were unsuccessful.

From Lane: JAMES W. HAMILTON, Judge.

Statement by MR. COMMISSIONER SLATER.

This is a contest over the will of George W. Pickett, who died in Lane County, November 22, 1902. What purports to be his last will and testament was admitted to probate in that county four days after his death, and letters testamentary were issued to S. B. Eakin, the executor mentioned therein. The will gave to each of decedent's brothers and sisters, except to two whom he mentions as being dead, and his sister Agnes Joyce, or to their surviving children, \$250; to his niece, Katie White, \$1,000; to his friends, Henry Hoffman and his wife Helen Hoffman, each \$500; to the Masonic lodge, \$100, in trust, the interest to be used in keeping his grave in repair; and to Mrs. Joyce, the remainder of his property—and directed that George B. Dorris, his lawyer, assist the executor in settling his estate. Thereafter the contestants herein filed a petition to vacate and annul the probate of said instrument; and prayed that it be declared not to be the will of said George W. Pickett. The grounds for the relief asked are: (1) That the will was not legally executed; (2) that the testator did not possess testamentary capacity; and (3) that it was made under undue influence. After taking a large amount of testimony the court affirmed its former order of probate. From this decree an appeal was taken to the circuit court, which concurred in the original finding, and contestants appeal to this court.

AFFIRMED.

For appellants there were oral arguments by *Mr. Lark Bilyeu* and *Mr. Absalom Cornelius Woodcock*, with a brief over the names of *L. Bilyeu*, *A. C. Woodcock* and *Thompson & Hardy* to this effect.

I. The rule is fully established in this state that the burden of proof is upon the proponents to establish by competent tes-

timony the facts necessary to show the legal execution of the will and the testamentary capacity of the testator.

II. When the testator is blind and unable to speak, with his mind impaired, the ordinary subscription and execution of the will in the manner prescribed by statute is not sufficient proof upon the question whether the instrument offered for probate expresses the wish of the testator. When the will is executed it must be so executed as to show that the testator fully understood all that was done and wished just that thing to be done. The ordinary presumptions do not prevail in such a case as this: *Delafield v. Parish*, 25 N. Y. 9, 35; *Rollwagen v. Rollwagen*, 63 N. Y. 504, 517; *Wier v. Fitzgerald*, 2 Bradford, Sur. Rep. 42; *Van Pelt v. Van Pelt*, 30 Barb. 134; *Chaffee v. Baptist Missionary Soc.* 10 Paige, Ch. 85, 90; *Barry v. Butlin*, 1 Curt. Eccl. 639; Jarman, Wills, Vol. I, p. 29.

III. The rule as to what constitutes testamentary capacity in an ordinary case has been fully established in this state, but in proportion as the infirmities of the testator expose him to deception, it becomes imperative to require more positive proof that the testator did in fact fully understand every portion of the paper that he executed as his will.

For respondents (proponents) there were oral arguments by *Mr. Benjamin B Beekman* and *Mr. Jerry England Bronaugh*, with a brief over the names of *George B. Dorris, Watson & Beekman* and *Bronaugh & Bronaugh* to this effect.

1. The statute has prescribed the formalities with which a will shall be executed in this state. It must be in writing, signed by the testator, or by some other person under his direction, in his presence, and must be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator: B. & C. Comp. § 5548; *Skinner's Will*, 40 Or. 571, 580 (67 Pac. 951).

2. It is not essential that the testator shall himself request the witnesses to attest the will. The request may be made for him by another: *Ames' Will*, 40 Or. 495, 498 (7 Prob. Rep.

Ann. 536: 67 Pac. 737); *Skinner's Will*, 40 Or. 571, 585 (67 Pac. 951).

3. Under the rule prescribed and followed by the Oregon cases the instrument may be well executed without a word being uttered or intimation made by the testator, or any person for him, to the attesting witnesses or in their presence, that the writing being signed or executed is a will; neither need they know anything of its nature or import. The signing of the will by the testator in the presence of two or more competent witnesses, who subscribe their names thereto as such, in his presence, is sufficient: *Luper v. Werts*, 19 Or. 122, 135 (7 Am. Prob. Rep. 243: 23 Pac. 850); *Skinner's Will*, 40 Or. 571, 580 (67 Pac. 951).

4. The statute does not require that a will be read to the testator in the presence of the attesting witnesses, even though he is blind: B. & C. Comp. § 5548; *Skinner's Will*, 40 Or. 571, 579 (67 Pac. 951); *Martin v. Mitchell*, 28 Ga. 382, 384; *Wampler v. Wampler*, 9 Md. 540, 550; *Hess's Appeal*, 43 Pa. St. 73 (82 Am. Dec. 551); *Guthrie v. Price*, 23 Ark. 396, 408; *Hemphill v. Hemphill*, 13 N. C. 291 (21 Am. Dec. 331); *Boyd v. Cook*, 3 Leigh, 32; 1 Jarman, Wills (6 ed.), 35; 1 Redfield, Wills (4 ed.), 53, note 4.

5. A subscribing witness who is a beneficiary legatee or appointee under the will is competent to testify concerning the execution of the will and the testamentary capacity of the testator: B. & C. Comp. § 5564; 1 Redfield, Wills (4 ed.), pp. 253-4; 2 Greenleaf, Evidence (14 ed.), § 691, and notes 3 and b; *White v. Parr*, 168 Ill. 459 (48 N. E. 113, 117).

6. A mere appointment as attorney to assist the executor is not a beneficial appointment within the meaning of the statute. The right of an executor to select his attorney cannot be controlled, even by the will of the decedent: *Waite v. Willis*, 42 Or. 288, 290 (70 Pac. 1034); *Young v. Alexander*, 16 Lea, 108; 11 Am. & Eng. Enc. Law (2 ed.), 1241.

7. The rule is settled in this state that if a testator at the time he executes his will understands the business in which he

is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body or extreme distress: *Hubbard v. Hubbard*, 7 Or. 43, 45; *Heirs of Clark v. Ellis*, 9 Or. 128, 134-148; *Chrisman v. Chrisman*, 16 Or. 127, 132 (6 Am. Prob. Rep. 156: 18 Pac. 6); *Luper v. Werts*, 19 Or. 122, 125 (7 Am. Prob. Rep. 243: 23 Pac. 850); *Franke v. Shipley*, 22 Or. 104, 105 (29 Pac. 268); *In re Cline's Will*, 24 Or. 175, 177-178 (41 Am. St. Rep. 85: 33 Pac. 542); *Carnegie v. Diven*, 31 Or. 366, 369 (49 Pac. 891); *Swank v. Swank*, 37 Or. 439, 444 (61 Pac. 846); *Ames' Will*, 40 Or. 495, 504 (7 Prob. Rep. Ann. 536: 67 Pac. 737); *Skinner's Will*, 40 Or. 571, 576 (67 Pac. 951); *Dean v. Dean*, 42 Or. 290, 298 (70 Pac. 1039).

8. It has also been established that the mental capacity of the testator is to be tested as of the time of the execution of the will, and, other things being equal, the evidence of the attesting witnesses and, next to them, of those present at the execution of the will is most to be relied upon: *Heirs of Clark v. Ellis*, 9 Or. 128, 147; *Chrisman v. Chrisman*, 16 Or. 127, 138 (6 Am. Prob. Rep. 156: 18 Pac. 6).

9. While evidence of the testator's mental condition and of his acts, conduct and habits, both before and after the time of the execution of the will, is competent, it is only admissible for the purpose of throwing light on the actual condition of the testator's mind at the very time the execution of the will took place, which is the crucial period and the true time to try the testator's mind: *Chrisman v. Chrisman*, 16 Or. 127, 138 (6 Am. Prob. Rep. 156: 18 Pac. 6); *State v. Hansen*, 25 Or. 391, 396 (35 Pac. 976); *Von de Veld v. Judy*, 143 Mo. 348 (44 S. W. 1117, 1120); *Kerr v. Lunsford*, 31 W. Va. 659 (2 L. R. A. 668: 8 S. E. 493); 16 Am. & Eng. Enc. Law (2 ed.), 614; Abbott, Brief on Facts, 429, par. 14.

10. Ability to transact ordinary business is a more stringent test of testamentary capacity than the law requires. If a testator has capacity to transact ordinary business, the presump-

tion arises that he is capable of doing any act requiring no greater capacity, which would include the act of making a will. But the converse is not true, and a person who is incapable of transacting ordinary business may have sufficient capacity to make a testamentary disposition of his estate: *Wagh v. Moan*, 200 Ill. 298 (65 N. E. 713); *Crossan v. Crossan*, 169 Mo. 631 (70 S. W. 136, 138); *Perkins v. Perkins*, 116 Iowa, 253 (90 N. W. 55, 57).

11. The evidence shows that the testator, George W. Pickett, possessed ample testamentary capacity to execute the will of April 22, 1902. The following cases are illustrative and quite in point: *Heirs of Clark v. Ellis*, 9 Or. 128; *Chrisman v. Chrisman*, 16 Or. 127 (6 Am. Prob. Rep. 156: 18 Pac. 6); *In re Cline's Will*, 24 Or. 175 (41 Am. St. Rep. 85: 33 Pac. 542); *In re Will of Silverthorn*, 68 Wis. 372 (32 N. W. 287); *Cheney v. Price*, 90 Hun, 238 (37 N. Y. Supp. 117); *Von de Veld v. Judy*, 143 Mo. 348 (44 S. W. 1117); *Perkins v. Perkins*, 116 Iowa, 253 (90 N. W. 55); *O'Connor v. Madison*, 98 Mich. 183 (57 N. W. 105); *Van Riper v. Van Riper* (N. J.), 59 Atl. 244; *Woodman v. Illinois T. & Sav. Bank*, 211 Ill. 578 (71 N. E. 1099).

12. To invalidate a will on the ground of fraud, coercion or undue influence it is not sufficient to show that the person deriving benefit or advantage under the will had the motive and opportunity to exercise such fraud, coercion or undue influence; there must be evidence that he actually exercised it and controlled the actions of the testator to such an extent that the instrument is not his free and voluntary act: *Hubbard v. Hubbard*, 7 Or. 43, 47; *Holman's Will*, 42 Or. 345, 358, 362 (8 Prob. Rep. Ann. 336: 70 Pac. 908); *Goodbar v. Lidikey*, 136 Ind. 1 (35 N. E. 691, 692: 43 Am. St. Rep. 297, 299).

Opinion by MR. COMMISSIONER SLATER.

We shall discuss and determine the issues in the order hereinbefore set forth.

Was the will legally executed? It appears from the testimony that Pickett for some years prior to the 22d day of April, 1902,

the day on which the will was executed, had been afflicted with an arterial disease, technically known as arterio sclerosis, from the effects of which he had become almost, if not entirely, blind at the time the will was executed, and had become afflicted with an impediment in his speech. The will was prepared by George B. Dorris, an attorney of long experience and excellent standing at the bar of Lane County, two or three days prior to the 22d day of April, 1902, and, in response to a notice from him that the will was ready for execution, the decedent on that day came to Dorris's office in the City of Eugene, accompanied by Charles A. Davis, who was his regular attendant, but who did not go into the office with Pickett. According to the testimony of Dorris, which stands uncontradicted, he then and there read over the will to decedent, who said it was just as he wanted it. Dorris and decedent then went to the First National Bank of that city to procure witnesses to attest the execution thereof. Having gone into the directors' room—a small room in the rear of the bank—Dorris called into the room P. E. Snodgrass and F. N. McAllister, who at that time were employees of the bank, and in the immediate presence of decedent, and in an audible tone of voice, so that decedent could hear him, Dorris said to Snodgrass and McAllister, "Mr. Pickett wants you to witness his will." Dorris then took the will out of his pocket, placed it on the table and asked Pickett, "Has the will been read to you?" and he answered, "It has." Dorris then asked him, "Is it as you want it?" He answered, "It is as I want it." Pickett had an impediment in his speech and emphasized the words "as I want it." They were spoken louder than the other words. Dorris then said to Pickett, "Shall I write your name to the will?" and he replied, "Yes, I can't see to write it myself." Dorris then wrote the name of decedent at the foot of the will, following it with a seal, after which he wrote these words: "The name of Geo. W. Pickett written by Geo. B. Dorris, at his request and in his presence and the presence of the subscribing witnesses hereto." Immediately following these words, Snodgrass, McAllister and Dorris subscribed their names and places

of residence. Dorris, on the witness stand, identified the will, and the name of George W. Pickett written by himself, and the signatures of the two witnesses together with his own.

F. N. McAllister testifies that he had been acquainted with Pickett about five years, whom he saw quite often in the bank where witness was bookkeeper, Pickett having an account with the bank; that witness and P. E. Snodgrass were in the room when Dorris asked Pickett if that was his will and he said it was; that Dorris asked him if it had been read to him, and he said that it had, and that it was just as he wanted it. McAllister could not remember whether Dorris asked Pickett if he should sign his (Pickett's) name, or not, but he knew Pickett was blind, and not able to write his name, and he was feeble at the time. Nor could witness say whether Pickett told Dorris to write his name or not; but he does say that Dorris wrote Pickett's name to the will in the presence of Snodgrass and himself, and that he signed his name to the will as a witness in the presence of both Dorris and Snodgrass. After the witnesses had come into the room, it was stated to them by Dorris for what they were wanted, and McAllister says:

"I knew the character of the instrument. I thought Mr. Pickett knew what he was doing. He seemed very feeble and I could see he was blind. He seemed to answer all the questions intelligently."

This witness identifies his signature to the formal proof of the will which he says was made a short time after the death of Pickett. On cross-examination, he testified that he had no occasion to speak to Pickett while in the room, but he thought Pickett knew that he was to witness the will, and that he signed his name to the will at Dorris's request to witness his (Dorris's) act in signing Pickett's name, and that Pickett seemed to assent to everything done at that time; that Pickett did not know witness was in the room, so far as seeing him was concerned, nor did he know what paper was being signed for him, so far as seeing was concerned, nor could he have known what paper was being signed, except what some one told him, and there was

no discussion about the provisions of this instrument, the contents of it or details of it. Nothing whatever was said about this paper except that it was his will.

P. E. Snodgrass, the other witness to the will, testifies that he was cashier of the bank, and that he had known Pickett for 10 or 12 years prior to the 22d day of April, 1902. His acquaintance with Pickett grew out of the latter's business relations with the bank. For a number of years Pickett could not write his name very well and his eyesight was bad, and for some time Pickett's name had been signed for him by others to checks when he wished to draw money out of the bank. Witness identifies his own signature to the will, and to the formal proof of the will, and states that he was requested by George B. Dorris, in Pickett's presence, to act as a witness to the execution of his will. What occurred at that time is more particularly stated by the witness in his own language as follows:

"When I was first called, I do not remember the exact words spoken by Mr. Dorris, but I knew from what he said that he wanted us to witness this will. He wanted one other witness there, some one to witness with me the signing of the will. When we went into the rear office to the table, I do not know just the words that was used, but he made it plain to me that he had written Mr. Pickett's will, and he wanted us to witness that, Mr. McAllister and myself—there was four of us in the room. Mr. Pickett attempted to talk and tell us something about what it was, but he seemed to be unable to express himself, that is, he did not talk plainly. There seemed to be rather an impediment in his speech more than anything else. Mr. Dorris asked the question of him, if that was his will, and if it had been read to him, and if the contents were what he wanted; and, if I remember right, Mr. Dorris read to us that part setting forth the fact that he, at the request of George W. Pickett, was signing his name to the will, and then he signed it, and Mr. McAllister and I witnessed it. That part I remember, his reading that part stated there; that Mr. Dorris signed it at the request of Mr. Pickett, and Mr. Pickett assented that the will had been read to him, and that Mr. Dorris was to sign it at his request. * * Pickett attempted to speak, but he had this impediment in his speech, so that he was not able to say 'yes' or 'no' readily to questions, but he assented so I understood that he

knew what he was attempting to do. He assented to the questions.

Q. In what tone of voice did Mr. Dorris ask those questions of Mr. Pickett?

A. I think in the usual tone of voice that one would address to a person when close to them. * *

Q. Were they audible to yourself?

A. Yes, sir. * *

Q. When did you and Mr. McAllister sign as witnesses with reference to Mr. Dorris's signing Mr. Pickett's name to the will, before or afterwards?

A. We signed it afterwards, immediately after he signed the will.

Q. Did you witness the signing of the signature by Mr. Dorris as a witness also?

A. I do not remember that Mr. Dorris signed as a witness. If he signed it, I do not remember that.

Q. Did you remain in the room until the execution was completed?

A. Yes, sir.

Q. Did all four of you remain in the room until the execution was completed?

A. Yes, sir.

Q. Signed and witnessed?

A. Yes, sir.

Q. Was Mr. Pickett aware of your presence there as a witness?

A. I think he certainly was.

Q. Was Mr. Pickett with Mr. Dorris when he first requested you to come in and sign as a witness?

A. Yes, sir. Standing within a few feet of him, three, four or five feet.

Q. At the time of the execution of the will, where were you all standing with reference to each other in the directors' room?

A. We have a table in the office, about the size of this one (referring to the table used by the reporter). We were all up immediately around that table."

The witness identified his signature to the formal proof of the will made after Pickett's death, and the will itself was

offered and admitted in evidence, to the admission of which the contestants objected, on the ground that it was not shown that the will was legally executed and attested, and it was not shown that the paper alleged to be the will of George W. Pickett was his will, or that the execution thereof was his voluntary act. On cross-examination, said witness stated that at the time of the execution of the will in the directors' room, the contents thereof was not read or discussed, and that he knew nothing about its contents; but that Dorris did read the statement at the foot of the will to the effect that, at the request of Pickett, Dorris signed his name to the will; that he heard that matter discussed, and that Pickett did not personally request witness to sign the will as a witness.

"Q. Did he at any time say anything to you about signing as a witness to the will?

A. No; I could not say that he did. He attempted to talk to us. The way I remember it is this: He having this slight impediment in his speech, Mr. Dorris assisted him by asking him the question, that he wanted us to sign the will, and if it was his will, and if it had been read to him, and he assented to it, so that it was clear in my mind that that was what he wanted with us, to sign the will as witnesses; and he came in there for that purpose."

1. The foregoing is, we believe, a fair summary of the material testimony offered in proof of the legal execution of the will. This evidence was not controverted; but it is contended by counsel for contestants that Dorris is disqualified under our statutes from being a subscribing witness to the will, and from testifying in support thereof, because he has an appointment in the will as attorney for the executor, and has been acting as such attorney, although by his answer he renounces all benefits under the will. The provision of the will referred to by counsel is as follows:

"I appoint Geo. B. Dorris, attorney at law, to assist the executor in settling my estate."

The statute to which counsel refer is doubtless Section 5564, B. & C. Comp., which, so far as it is applicable, is as follows:

"If any person has attested or shall attest the execution of any will, to whom any beneficial * * appointment of or affecting any real or personal estate * * shall be thereby given or made, such * * appointment shall, so far only as concerns such person attesting the execution of such, or any person claiming under him, be void; and such person shall be admitted as a witness to the execution of such will."

The provision of the will above referred to cannot be construed as giving or making to Dorris "any beneficial * * appointment of or affecting any real or personal estate," nor can it be construed to be anything more than an advisory provision, which the executor may follow or disregard according to his own judgment. It confers no rights upon the appointee: *Young v. Alexander*, 16 Lea, 108.

2. The fact that Dorris is acting as an attorney for the executor in the settlement of the estate, and in this contest, is of no consequence; for he could not do so without the executor's consent and employment of him, and to him Dorris must look for his fees. The appointment of an attorney is personal to an administrator or executor: *Waite v. Willis*, 42 Or. 288 (70 Pac. 1034).

3. Counsel for contestants urge that, Pickett being blind, and, as they contend, quite deaf, and unable to speak, proof of the ordinary signing and execution of the will in the mode prescribed by the statute, is not sufficient to establish the fact that the instrument offered for probate contains the will of the testator. It was admitted by the proponents of the will that Pickett was blind, but it was denied that he was deaf or hard of hearing or could not speak, and the evidence hereinbefore quoted and referred to shows beyond any doubt that Pickett, at the time of the execution of the will, could and did hear ordinary conversation carried on by those in his immediate presence; that he understood what was being said by others; and that, with some effort, he made intelligent replies to questions then put to him by his attorney.

Under this state of the record, the contention of counsel for contestants as to the law applicable to this question is based

upon a false premise, excepting in so far as it is conceded that Pickett was blind. He was, through his sense of hearing, conscious of the presence in the room of the two persons who were to act as witnesses to his will, and of the purpose for which they were there, and of what was being done there at that time by them in his behalf. No other conclusion can be correctly derived from this testimony. Being conscious of what was being said and done at that time in reference to the execution of the will, and making no objection, the acts of said Dorris and said witnesses have the same effect in law as if done by his express request. "If such third person acts truly for the testator, in his conscious presence and with his apparent consent, the legal effect is the same as though the testator himself had spoken and directed the business": Schouler, Wills (2 ed.), § 329. This authority is cited with approval by Mr. Justice MOORE, in *Ames' Will*, 40 Or. 495 (7 Prob. Rep. Ann. 536: 67 Pac. 737). It was stated in Pickett's hearing that those two persons were to act as witnesses to his will. They were requested by his attorney, in his presence, to act in that capacity. At the same time he was asked by his attorney if the will had been read to him, and he said it had; if it was as he wanted it, and he said it was; and "Shall I write your name to the will?" to which he replied, "Yes, I cannot see to write it myself." While McAllister cannot say that Dorris asked him that question, or whether Pickett told Dorris to sign his (Pickett's) name, yet Snodgrass does remember, and is emphatic in the statement that just before Dorris signed Pickett's name to the will he (Dorris) read the statement that by the request of Pickett he signed his name to the will, and that he (witness) heard that matter discussed. Section 5548, B. & C. Comp., provides that every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator. And Section 5549 provides that every person who shall sign the testator's name to any will by his direction shall subscribe

his own name as a witness to such will, and state that he subscribed the testator's name at his request. The testimony heretofore adverted to not having been controverted, it must be admitted as conclusively establishing the fact that all the requirements of the statute respecting the execution of a will were fully complied with, and that it was legally executed.

4. Did the testator possess testamentary capacity? It is the main contention of counsel for contestants that he did not. In this connection they urge that the burden is upon proponents to establish the fact of testamentary capacity by a preponderance of the testimony, as well as the fact that the mind of the testator accompanied the act of execution, thereby making the instrument his will. They also urge that, when a testator is blind or unable to speak, and his mind is impaired, the ordinary subscription and execution of a will in the mode prescribed by the statute are not sufficient to raise the presumption of the competency of the testator, and that it contains his unrestrained wishes in the disposition of his property; but, to produce that result, the will must be read in the presence of the subscribing witnesses. Mr. Justice WOLVERTON, in *Holman's Will*, 42 Or. 345, 357 (8 Prob. Rep. Ann. 336: 70 Pac. 908, 913), says: "The burden of proof, in the probate of the will rests with the proponent, as it relates to the due and regular execution, the testamentary capacity of the testator, and his voluntary act, free from the domination of fraud, undue influence or coercion. This is the doctrine announced in *Hubbard v. Hubbard*, 7 Or. 42, and, in principle, has been reaffirmed in the *Chrisman Case*: 16 Or. 127 (18 Pac. 6). In the latter case, the only ground for contest was as to the testamentary capacity of the testator; but it is just as essential to show that the will was not superinduced by fraud, deceit or undue influence, to make it his act and will, as it is to establish a disposing mentality. It must be the 'last will,' says Baron PARKE, in *Barry v. Butlin*, 1 Curt. Ecc. 637, 'of a free and capable testator.' It is said in *Greenwood v. Cline*, 7 Or. 17, that 'where a will is shown to have been duly executed, the law presumes competency in the testator,

and that it contains his unrestrained wishes in the disposition of his property.' The presumption is a disputable one, however, and may be overcome or refuted by other proofs. It is, notwithstanding, sufficient *prima facie* to establish the will, but it does not shift the burden of proof. That rests from first to last with the proponent, and, if he would prevail, he must have the stronger case in the end."

Mr. Redfield, in his work on Wills (volume I, 4 ed., § 57), says: "The statute does not require a will to be read to the testator, in the presence of witnesses; but it is proper to do so, although not absolutely indispensable, when the testator is blind, or cannot read. Besides the mere formal proof of execution, which is required in all cases, something more seems necessary to establish in the most satisfactory manner the validity of a will, when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. Additional evidence is required that his mind accompanied the will, and that he was cognizant of its provisions. This may be established by the subscribing witnesses, or other proof.' It is not absolutely required in the proof of wills executed by blind persons that the witnesses should be able to depose that the testator was cognizant of the contents of the paper which he declares to be his will and desires the witness to attest. This has been so ruled in the cases already cited. And the same rule applies to persons deaf and dumb, as well as blind. The rule laid down by Swinburne (part 2, § 11, pl. 1, citing a long list of civil law and continental writers to the point), in regard to the formalities requisite to the validity of wills made by blind persons, seems altogether reasonable: 'He cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will. And, therefore, if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this were not sufficient; for it may be that if he should hear the same he would not own it.'

But, as we have before seen, this rule has been very much relaxed, both in England and America, and we see no reason for requiring positive evidence of the will being read to a testator who is blind, in the presence of the witnesses; since it has been decided that where a will is drawn up in the presence of the testator, and signed by him, although not read to or by him, if properly executed and witnessed, it becomes a valid testament, upon proof that it was in fact drawn up according to the testator's instructions. But upon principle, we should have regarded both of the foregoing propositions not maintainable upon unquestionable authority, and practically are more convenient than a more strict construction": *Martin v. Mitchell*, 28 Ga. 382; *Wampler v. Wampler*, 9 Md. 540; *Hess' Appeal*, 43 Pa. 73 (82 Am. Dec. 551); *Hempill v. Hempill*, 13 N. C. 291 (21 Am. Dec. 331). But proponents in this case are not reduced to the extremity of having to rely upon merely a *prima facie* case, consisting only of presumptions arising from the formal execution of the instrument in accordance with the terms of the statute. The evidence shows conclusively that the will was read over to the testator by his trusted attorney on the same day, and shortly before its execution, and that the terms of the will are in conformity with the wishes of the testator, as expressed by him to his attorney some time before that; that after the reading of the will the testator said it was as he wanted it, and, finally, and immediately preceding the execution thereof, he expressed assent that the will was as he wanted it.

5. So, then, the sole question to be determined is the mental capacity of the testator at that time, that is, his testamentary capacity. To determine this question, we are obliged again to refer to the evidence in addition to that already set forth; but, owing to the voluminous character of the testimony, it will be impossible to do more than refer to the salient features of it. It appears from the testimony that on January 10, 1902, decedent came to Dorris's office and employed him to do his writing for him, look after his bank account and checks and see that they were right, saying that his eyesight was failing him, but

that he could collect his own rents. He paid Dorris at that time for one year's services and took a receipt which was afterwards found among decedent's papers, and is in evidence. On January 27, 1902, he had Dorris send a telegram to Dallas, Tex., to Mrs. Agnes Joyce, his sister, and one of the respondents herein, to come to Eugene at his expense, that he was in poor health. At that time he mentioned to Dorris that he might want a will drawn if he found it necessary; but he did not know that it was necessary because his sister, Agnes Joyce, was his only living relative so far as he then knew. Dorris, on learning from deceased that he had brothers and sisters from whom he had not heard for 30 or 40 years, and that he did not know whether they were living or dead, advised him that if any of them were living, or if they had died leaving children, they would share his estate equally with Agnes Joyce, to which Pickett said, "I don't want it that way." And he then stated further to the effect that he intended to give his sister the Eugene property and that he wanted his Junction City property to pay his funeral expenses, build a monument, and give his niece, Katie White, \$1,000. At this time Dorris took down the names of all of decedent's brothers and sisters, as given to him by decedent. Mrs. Agnes Joyce, in response to her brother's telegram, arrived in Eugene February 4, and remained until March 4, during which time she lived in decedent's building with him, and looked after him, seeing him every day, and took her meals with him at the Hoffman House.

During this time decedent was nearly blind and could not see to get around very well. He talked with his sister on current topics and events, and was interested in the ordinary subjects of conversation, having the papers read to him every day. About February 8 or 9, he told his sister that she was his only living heir, and that if she should outlive him his property would go to her; but that he was going to make a will, as he wanted to give something outside. Nothing was said between Agnes Joyce and Dorris about the will. About March 12, Pickett had Dorris procure for him a transfer of \$2,000 which decedent

had in the bank at Junction City, to a bank in Eugene. On the 15th of March, decedent had Dorris procure exchange on New York for \$1,000 in favor of Alice Joyce; being the same person as Agnes Joyce, which he caused to be sent to her at Dallas, Texas, as a gift. About the 14th of March, decedent became quite sick, and for at least one or two nights he was delirious, and at different times during that month, usually in the late afternoon or evening, he was out of his head; but during the morning and forenoon of each day he was in his normal condition of mind. About the last of March, Mrs. Joyce received a telegram at her home in Dallas, Texas, from Mrs. Hoffman of Eugene, saying that decedent was worse, and she returned to Eugene, arriving March 30. She found that her brother had been very ill, but was then much better. He knew her, and seemed to be all right, as she testified. From that time she was with decedent during the daytime whenever he was in his room, and his nephew, John Colvin, was with him at night. Charles Davis was with him during the daytime from February 19 until May 4, when decedent discharged him, and hired Colvin because he could get the latter for \$1.25 per day, whereas he had been paying Davis \$2 per day. Decedent was out of the house a good deal during the daytime, walking to procure exercise, and during such time he was always accompanied by Davis or Colvin. He said nothing to his sister after she came back about the property. She testifies that he was better during April, except one evening about the 20th or 21st, when he got mad and his mind was not clear.

The testimony on the part of the proponents shows that prior to and for some time after the making of the will, decedent collected his rents, paid his own personal expense bills, including the wages of his attendant; but when it was necessary to draw a check, others assisted him by signing his name, as when he paid his taxes to the sheriff some time in March. Davis testifies that for quite a while decedent's mind was apparently as good as it ever had been, and that during the months of March and April his mind was in the same condition it always had

been. About April 12, 1902, Pickett again came to Dorris's office, and asked him to make his will, and, in the conversation they then had, they referred back to what had been said on that subject in the previous conversations, and at that time Pickett gave Dorris information as to the character of his property, being a business block in Eugene, which he valued at \$20,000, two-sevenths of the stock in the Junction City Bank with the building, and some money in the bank. Pickett supposed the stock and the money he had in the bank would perhaps be about \$5,000. He then directed Dorris to include in his will \$250 for each of decedent's brothers and sisters, if they were living, but if they were dead that such sum should go to the children of each of them, if any. Decedent at this time asked Dorris if a brother and all of his children were dead, what would become of the money given to such brother in the will. Dorris told him that it would go to the decedent's sister; she being the residuary legatee. Decedent directed Dorris to put into his will \$1,000 for his niece Katie White, and to provide for the payment of his funeral expenses, and for a monument. A few days thereafter, after consultation with Dorris, decedent directed him to name S. B. Eakin as executor, and Dorris suggested that, as decedent had no relatives living at Eugene, he had better make provision for the care of his grave, which he did by directing Dorris to leave \$100 in trust to the Masonic lodge for that purpose. Before drawing the will, and while Agnes Joyce was in Eugene on her first visit, Dorris asked her for the names of all her brothers and sisters, but said nothing to her about a will, or for what purpose he desired the information. She gave him the names, and they corresponded with those given to him by the decedent.

From the time Dorris commenced doing business for decedent, decedent's mental condition was good, so far as knowing his own business was concerned. He knew what property he possessed, and seemed to know how to take care of it. And, in conversation with him, Pickett showed more than ordinary intelligence with reference to business transactions. Dorris testified that he

used no persuasion or influence, and made no suggestions to him as to how to make his will or any part of it, excepting he suggested to Pickett the trust fund of \$100 to provide for caring for his (decendent's) grave; that no one ever spoke to him about this will; that he always knew Pickett had the Eugene property, and he learned from Pickett concerning all his other property; that he knew nothing about Pickett's family, except what he learned from Pickett himself and Mrs. Joyce; that no other person was present when the contents of the will were talked about between himself and decedent, and no other person but himself knew anything about the contents of the will prior to when it was opened after decedent's death. Soon after having made the will, decedent spoke of the matter to Davis, his attendant, and also to his sister, merely saying he had made a will, but nothing as to its purport or contents. Numerous acts of attention to matters of private business by decedent occurred during the months of April and May, all tending to show more or less cogently his mental capacity properly to attend to such matters, the most striking of which is, perhaps, his discharge of Davis as his attendant on May 4 and his employment of Colvin to serve in that capacity, in order to save the difference between \$2 per day, which he had formerly paid Davis, and \$1.25, which he afterwards paid Colvin, which acts are cited to show his mental status.

To meet this testimony on the part of proponents, the contestants offered several witnesses, who testified to irrational acts of decedent on the night of March 14, 1902, when he had been acting in a wild and strange manner, indicating that at that time he was more or less mentally deranged, and that this condition continued for several days thereafter. Five or six different persons, who had known decedent, and had recently been upon terms of intimate friendship with him, testified to his inability and failure to recognize them when they happened to meet on the street, although particular pains were taken at the time to inform him as to the identity of the persons talking to him, and incidents of their former associations and acquaintance were recalled to

him; but decedent stated that he did not know such persons. One instance of this character is stated to have occurred as early as March 2, 1902, but the time of the occurrence of the majority of them is not precisely fixed, and evidently most of them occurred after the will was executed. Both Davis and Colvin, witnesses for proponents, and who had been his attendants, deny that any such things ever happened.

The main reliance of contestants to prove the want of mental capacity of the decedent is upon the evidence of Dr. T. W. Harris, who attended upon decedent during the latter's illness. He called upon decedent on February 1, 1902, when he treated him for a cutaneous eruption, but the underlying cause of his trouble was arterio sclerosis, or hardening of the blood vessels. It is occasioned by a deposit of fibroid tissues in the walls of the blood vessels whereby the blood vessel loses its elasticity, and at the same time is narrowed so that the smaller blood vessels or arteries sometimes become so small that they carry no blood at all, and consequently the several organs of the body are deprived of the necessary amount of sustenance to maintain them in their usual vigor. In this case the artery supplying the brain and particularly the region of the optic nerve, first became seriously affected, and for that reason he lost his eyesight. Dr. Harris saw him from time to time, but not continuously. He called to see him some time in the latter part of March, when he seemed to be very much excited. His condition at that time was characteristic of cases of that kind. Conditions of excitement or distress, particularly an attack of indigestion, would excite and aggravate the mental condition very much. Decedent was inclined to have acute indigestion, and occasionally he had attacks which would greatly excite his mental condition. At those particular times he would become mentally unbalanced. In a day or two the digestive condition would be corrected, and his mental condition would clear up and become more nearly normal as compared with his condition when excited by indigestion. Pickett's case was progressive from the time the witness first saw him, and there was a gradual diminution of mental capacity

and strength, which could not probably be noticed by comparing one day with another, but could be by comparing several days together. Witness was not able to state specifically what Pickett's mental and physical condition was on April 22, 1902, the date of the will; nor could he say that he was enjoying relief from any excitement at that time.

Dr. Harris gives the following opinion of decedent's general mental capacity and physical condition during the time he attended him:

"As to his capacity to make a will on April 22, I believe that, if the property consisted of all money or real estate, in one simple piece of property, say a block, and if the beneficiaries were one, two or three, between whom this property should be divided equally, I believe that it would have been possible for Mr. Pickett at that time to have made such a distribution. Where, however, on the other hand, if the property consisted of money, notes and accounts, and realty and personal property, and the beneficiaries were numerous, and the distribution made unequal, I do not believe he could have taken this up and initiated it at that time, and have made the distribution intelligently, for the reason that he could not sustain a mental effort long enough to do it. If he had formulated this prior to this time and fully fixed it in his mind, just what he wanted to do, and what he intended to do, it would have been possible probably for him to have made that distribution. * * From the time I was called to see him, I do not think there was a day from the time I saw him he would have been able to initiate the matter, putting the property on one side, and the beneficiaries on the other side, between whom he was to make an unequal distribution. * * The final result of his trouble was a complete loss of mind, total inability to command himself in any way, loss of the use of muscular co-ordination. He could not co-ordinate or command the group of muscles to the accomplishment of a definite object. * * It was sometimes difficult for him to talk for that reason, he could not co-ordinate the muscles of articulation. * * He became totally unconscious only a short time before his death. * * Sometimes he would apparently be rational; then, speak to him sharply, he might recognize a name; do that, and he would probably answer a question or two rationally, and he would relapse into a condition of delirium. * * Well, there was only one particular thing, one dominant characteristic,

about Mr. Pickett, and that was a kind of stubbornness. He was peculiar in that respect. He liked to antagonize, liked to oppose; you state that a certain thing was so, he liked to say it was not so. That is one peculiar characteristic that continued for a long time, but, outside of that, he did not have the mental strength he formerly had. * * There were several times when he was in that condition of mania, and the first manifestation of that that he had at all was in a mild way. * * Some time about the 20th to the 24th of March—somewhere along there. * * This was brought about by associated conditions, particularly the indigestion. * * He had not had any that I could ascertain of that kind prior to that time. * * Mr. Pickett was better of mornings, * * his mind would be clearer and stronger for a time than in the evening, because the general wear and tear of the day would always wear his mind out so that of an evening he would not be able to think very much. * *

So far as he thought, he thought accurately; but the facts in the case are he was not able to think strongly or for any length of time. * * There was no time that he would not recognize me, or recognize one coming into the room. Sometimes he would not recognize me at all until I had talked with him some little time, and when I would tell him who I was, he would recognize me. * * I made visits in April on the 23d and 28th. Have no recollection concerning the visit on the 23d; nothing about it that impressed me more than any other visit. He did not lose his characteristic of stubbornness until some time in September. In February, March and April he was pretty stubborn; he still had that peculiar characteristic. * * If he had the matter thoroughly in mind before the will was made that he had made up his mind as to what he was going to do, or what he intended to do, I do not think anybody could move him at all. If he had taken up the matter at that time, negotiated the matter at that time, he would attempt to carry it out. * * He was rather inclined to be irritable at best. * * He had indigestion and dyspepsia pretty badly. * * I was not called to see him in March or April when he was acting strangely, except on the occasion of the spell during the latter part of March. That was the first I had knowledge of. He was then somewhat delirious. The trouble was owing to the condition of his digestive organs. During that spell I saw him during the day and evening, too. I found him considerably agitated. He talked and kept walking all the time, and you could not do anything with him. * * A person with arterio sclerosis can

think correctly so far as he is able to think, and finally when the blood vessels become so hard as to prevent the blood going through, the mind is unable to work at all, delirium ensues, and finally death. * * That was the history of Pickett's case. He could think to a certain extent until the flow of blood was cut off entirely. * * He responded to the tendon reflex test. An insane man ordinarily fails to respond to that, but it depends on what part of the brain is affected. * * I have no specific recollection as to his condition on April 22."

The rule is well settled in this state that, if at the time a person executes his will, he understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses testamentary capacity, notwithstanding his old age, sickness, inability of body or extreme distress (*Ames' Will*, 40 Or. 495 (7 Prob. Rep. Ann. 536: 67 Pac. 737)), and the mental capacity of the testator is to be tested as of the date of the execution of the will, and, other things being equal, the evidence of the attesting witnesses, and, next to them, of those present at the execution, is to be most relied upon: *Heirs of Clark v. Ellis*, 9 Or. 128; *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. 6). Evidence, however, of the testator's mental condition, of his acts, conduct, habits, both before and after the execution of the will, is admissible, but only for the purpose of throwing light on, and, so far as it tends to indicate, the actual condition of the testator's mind at the time of the execution of the will, which is the crucial period: *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. 6); *Carnegie v. Diven*, 31 Or. 366 (49 Pac. 891). There is no direct evidence in the record of what the mental capacity of the testator was on the 22d day of April, 1902, other than that offered by proponents, which is included in the testimony of Dorris, who prepared the will, and of McAllister and Snodgrass, all whom were present at the time, and were witnesses to the execution of the will. Each of these parties, and especially Dorris, had previously had more or less business dealings with the testator, when he was unquestionably in a normal mental condition, and they were thus in a position

to judge by comparison more accurately than others as to the testator's mental capacity at that time. None of them observed in Pickett's actions at that time anything to indicate that he was not competent to execute the will. They saw nothing unusual about him at that time. The most impressive fact, perhaps, in this case, is that on January 27, 1902, the testator gave to Dorris the names of all his brothers and sisters, and then in general terms stated his wishes as to the manner of disposing of his property, namely, that he intended to give his Eugene property, valued by him at \$20,000, to his sister, Mrs. Agnes Joyce, and wanted his Junction City property, valued by him at \$5,000, to pay his funeral expenses, build a monument, and give his niece, Katie White, \$1,000. That is the time that he initiated the making of his will, and that was before his sister had arrived in Eugene, and hence it could not have been the result of any influence exercised by her. It certainly was the product of his own mind and wishes uninfluenced by any one.

It is conceded by counsel for contestants in their brief, in effect, that during the month of January, at least, Pickett had testamentary capacity; and his will, as finally made, is substantially in conformity with testator's original wishes expressed in that month. The specific bequest of \$250 to each brother and sister, other than Agnes Joyce, and the addition of the trust fund of \$100 to the lodge, are fully explained by the advice of his attorney. And the bequests of \$500 each to Henry Hoffman and Helen Hoffman are the only other changes from his expressed original intention. The value of the Junction City property is amply sufficient to cover all of these special bequests, including \$1,000 to Katie White; so that Agnes Joyce, the sister, will in fact receive by the terms of the will the identical property which the decedent in his mind set aside for her on January 27, 1902. But, passing over the other incidents of the case, we find that on April 12, only 10 days before the will was executed, he stated to his attorney what property he owned, and again discussed with him the terms of his will, directing his attorney how much to give to each of his brothers and sis-

ters, how much to Katie White, and, at the same time, directed Dorris to include \$500 each for Henry Hoffman and Helen Hoffman.

Opposed to this theory of the case, we find the claim made by the contestants of the mental unsoundness of the testator, based upon the opinion evidence of the attending physician, Dr. Harris. The diagnosis of Dr. Harris is not questioned by proponents, nor do they dissent from his description of the nature and character of his disease, or his statement of its gradual progressive character and ultimate effect upon the system. His description of the effect of the disease upon Pickett's mind, and of his mental capacity during the time he attended him professionally, impresses us with the conviction that Pickett was not insane, but that his brain, being deprived of the necessary flow of arterial blood, became starved and perhaps was not capable of any very great or prolonged mental effort. In fact, Dr. Harris says that, so far as he thought, he thought accurately, and that he could think to a certain extent until the flow was cut off. Dr. Harris called upon decedent only twice during the month of April, one of which times was on April 23, but he cannot recall what the condition of his patient was at that time. He gives his opinion, however, that if the property consisted all of money or all real estate in one simple piece of property, and if the beneficiaries were few, between whom this property was to be divided equally, it would have been possible for him at that time to have made such a disposition; but, if the property consisted of money, notes and accounts, and of real and personal property, and the beneficiaries were numerous and the distribution unequal, he did not believe decedent could have taken up and initiated it at that time, and made distribution intelligently, for the reason that he could not sustain a mental effort long enough to do it. He qualifies his opinion, however, by saying, that "if he had formulated this prior to this time, and fully fixed it in his mind just what he wanted to do, and what he intended to do, it would have been possible probably for him to have made that distribution." "I do not think there was a

day," he says, "from the time I (first) saw him he would have been able to initiate the matter, putting the property on one side, and the beneficiaries on the other."

At the utmost, this is but opinion evidence, which may or may not be correct, but it cannot be permitted to overcome the unqualified statements of an unimpeached witness of the existence of the very fact that the opinion says is impossible. We have here an opinion set up against a statement of a fact. Measured by the rule hereinbefore given for ascertaining the testamentary capacity of decedent, the uncontradicted testimony of Dorris, that within the time set down in the opinion evidence of Dr. Harris the testator did give to him a statement of what property he was possessed, and the names of the persons to whom he wished it to go, is conclusive that decedent was possessed of testamentary capacity at the time of the execution of the will. But we do not regard this opinion of Dr. Harris as being necessarily against the validity of this will on the ground of the want of testamentary capacity, but rather supports it. The opinion admits Pickett's mental capacity to make at least a simple will at the time he made the will in question, and even admits his ability to make a more complicated one, if he had formulated it prior to that time, and had fully fixed in his mind just what he wanted to do and what he intended to do. This is in fact what Pickett did, as shown by the uncontradicted testimony. Without further commenting upon other features of the testimony, it is sufficient to state that we are fully convinced that no other conclusion can be correctly derived from the whole record than that at the time the will was executed, the testator was possessed of testamentary capacity.

6. Was the testator subjected to undue influence? This question need not be considered at any great length. Mr. Justice WOLVERTON, in *Holman's Will*, 42 Or. 345, 358 (8 Prob. Rep. Ann. 336: 70 Pac. 913), declares the rule to be that, "the fraud, force or undue influence that will suffice to set aside a will must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another

instead, and must be the efficient cause, without which the obnoxious disposition would not have been made. This may be accomplished, not alone by physical coercion, or threats of personal harm or abuse, but also by the insidious operation of a stronger mind upon one weakened and impaired by disease or otherwise, whereby the latter is subjected to the former, and induced to do its bidding, instead of acting in the exercise of unconstrained volition or judgment. It is not all influence brought to bear upon the mind of the testator in the disposition of his property that may be denominated undue." Recalling the statements of Dr. Harris, that Pickett had a positive and dominant element of stubbornness in his character; that he did not lose that until in September; and that, if Pickett had the matter thoroughly in mind at the time the will was made, and had made up his mind as to what he wanted or intended to do, he did not think anybody could move him from his opinion; that if Pickett had taken up and initiated the matter at the time, witness thought Pickett would attempt to carry it out. There is much other testimony in the record to corroborate Dr. Harris's statements in this regard, and they concur with our own views of decedent's character. On the other hand, there is no direct evidence whatever that any one used or attempted to use any undue influence upon decedent to bring about the framing of this will as it now appears. Having found that Pickett initiated the making of his will on January 27, 1902, and before he came into personal contact with Agnes Joyce, the chief beneficiary, and against whom the greatest objection is made by contestants, and having also determined that the will as made is substantially in accordance with his original intention, it must necessarily follow that he was not unduly influenced by any one in the making of such will, and that it is the product of his unconstrained volition and judgment.

7. For these reasons, the decree of the circuit court should be affirmed, with judgment for costs on this appeal against the contestants.

AFFIRMED.

MR. JUSTICE EAKIN, being a brother of the respondent S. B. Eakin, took no part herein.

Argued 30 January, decided 19 March, 1907.

GALIGHER v. GALIGHER.

89 Pac. 146.

DIVORCE—THEFT AND KEEPING STOLEN PROPERTY AS CRUELTY.

1. The commission of theft and the keeping of the stolen property at home is ordinarily an act of personal indignity to the other spouse.

DIVORCE—ASSAULT BY ANOTHER AS CRUELTY.

2. The scramble of the wife for the possession of her child, which brought on an assault against the husband by her brother, is not such an act of cruelty toward the husband as to be ground for a divorce.

DIVORCE—EVIDENCE OF ADULTERY.

3. In a suit for divorce by the wife, evidence held insufficient to establish any immoral conduct on the part of the wife.

From Douglas: JAMES W. HAMILTON, Judge.

Suit for a divorce by Eva Galigher against John D. Galigher, with a cross bill by defendant asking affirmative relief.

There was a decree for plaintiff from which defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Albert Abraham*.

For respondent there was a brief over the name of *Coshaw & Rice*, with an oral argument by *Mr. Dexter Rice*.

MR. JUSTICE EAKIN delivered the opinion of the court.

The appeal calls for a review of questions of fact only, and, without referring to the evidence at length in this opinion, it is sufficient to say that it appears that from the time of the marriage in 1892 plaintiff and defendant have been in straitened circumstances financially, part of the time living on a homestead isolated in the mountains, and with little or no income. During all this time defendant has given little care or consideration to the plaintiff's comfort and happiness, absolutely inconsiderate and cruel towards her at childbirth, and his treatment of her at all times being arbitrary and exacting. And in time these conditions grew worse until estrangements arose that finally culminated in the separation and this suit for divorce. At the time of the last trouble the situation was evidently ripe for separation

on the part of both, and, as a consequence in all cases where there are children, the interests and disposition of the children is an all important question and the source of bitter contentions between parents. The defendant insisted on keeping the children, although without means to provide for them properly, or time, disposition or qualification properly to care for their persons, clothes and conduct. The defendant neglected them in all these particulars, and evidently tried to prevent the plaintiff from getting possession of them or even seeing them, and endeavored to prejudice the boys against the mother. And we think the finding of the court to that effect is fully justified by the evidence.

1. The commission of petty thefts by a husband and caching the fruits of his theft in and about his dwelling is certainly a personal indignity to a wife of honesty and refined feelings. The defendant denies the larceny of any property, but it is clear that the property that plaintiff mentions was brought to the place by defendant and left in and about the house, and we cannot doubt that he said to his wife, as she testified, that he "swiped" it or stole it, and such conduct on his part was sufficient to justify a finding upon that question to the effect that defendant was in the habit of making his dwelling house a cache for stolen property; and it was not necessary that plaintiff prove all the elements of the crime or establish his guilt.

2. Defendant complains of the assault of Fred Pilkington during the scramble for the child, but plaintiff is not responsible for that assault. It was not done by her procurement. Defendant was using violence against his wife, who is the sister of Pilkington, and it does not appear that she even called upon her brother for aid; but, if so, it was only for protection against defendant's violence. Without attempting to justify the acts of plaintiff in seeking to take the child, this scramble for the child, and the result of it, are not such an act of cruelty by the plaintiff toward the defendant as can be a ground for divorce.

3. There is no evidence that tends to establish any immoral conduct on the part of plaintiff. Defendant complains of plain-

tiff being out at night a great deal, but mentions only her going to her sister's or her mother's. He gives details of one night when he claims to have met her walking with a man on the railroad track, but, taking all the evidence relating to that matter as given by himself and the plaintiff, it is quite probable that he was mistaken as to the persons he met. He did not recognize them, although they met directly on the railroad track and under a switch light, but after he got past them he says he turned around and recognized his wife. He admits he did not speak to her and did not follow her, but went directly home, and that he was jealous of her. He frequently protested against her going out at all, and accused her of "being out chasing," and that she was not true to him, but none of these charges are established by the evidence, and we conclude that the findings of the lower court are fully justified by the evidence.

The decree is affirmed.

AFFIRMED.

Decided 5 March, 1907.

SEAWEARD v. PACIFIC LIVESTOCK CO.

88 Pac. 963.

WATERS—RIGHT BY RELATION—CONTINUITY OF APPROPRIATION.

1. Where the increase in the area of arable land for the irrigation of which water has been diverted varies with and is measured by the lapse of time, the additional application of water annually to meet the augmented demand, provided the appropriation is completed within a reasonable time, causes the entire appropriation to relate back to its inception, thereby cutting off all intervening rights of adverse claimants.

WATERS—TIME ALLOWED TO EXTEND APPROPRIATION.

2. The application of appropriated water to a beneficial purpose must be made with reasonable promptness, in view of the means of the appropriator and the physical obstacles encountered; and the same rule applies to extending the use or the enlargement of the cultivated area to be irrigated.

EXAMPLE OF UNNECESSARY DELAY IN ENLARGING USE OF WATER.

3. A delay of five years in extending the use of water to additional ground or other uses is *prima facie* unreasonable, and appropriations from the same source made during those years are superior to the claim of the original appropriator for more water than was being used when work ceased.

RIGHT OF APPROPRIATION BY TRESPASSER.

4. The rights acquired by the appropriation of water to be used on land in possession of a trespasser are considered but not decided. In the present case the allotment is sustained because the land has since passed to the true owner who is using the water for proper purposes.

From Malheur: GEORGE E. DAVIS, Judge.

Suit by J. H. Seawear and another against the Pacific Livestock Co. and others to enjoin interference with the flow of water in a certain stream. From the decree adjudging the rights of the parties in the stream, plaintiff and defendant Pacific Livestock Co. appeal. AFFIRMED.

For plaintiff there was a brief over the name of *King & Brooke*, with an oral argument by *Mr. William Rufus King*.

For defendant Pacific Livestock Co. there was a brief and an oral argument by *Mr. John Langdon Rand*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit to enjoin interference with the flow of water in the channel of Crooked Creek, in Malheur County. The complaint states in effect that the plaintiffs, J. H. Seawear and Anderson Loveland, are prior appropriators of water from that stream; that the defendant the Pacific Livestock Co., a corporation, is digging a ditch above their lands and threatening to divert all the water of the creek, to their irreparable injury; and that the defendants Pearl Duncan and Pedro Germain are using water for irrigation to which the plaintiffs are entitled. Germain made default; but, issues having been joined as to the other defendants, the cause was tried, and from the testimony taken the court made findings of fact, and, based thereon, concluded as matters of law that the Pacific Livestock Co. has a prior appropriation of 100 inches of water from the creek, and that the relative rights of the other parties to the use of the water of the stream and the extent of the subsequent appropriations thereof are as follows: Loveland, 150 inches; Seawear, 120 inches; and Duncan, 80 inches—miners' measurement, under 6-inch pressure, all of which rights are superior to the claim of the corporation to the use of any water in excess of 100 inches. A decree having been rendered in accordance with the findings, the plaintiffs and the Pacific Livestock Co. separately appeal.

The testimony shows that Crooked Creek is a perennial stream

issuing from a spring situated on land owned by the Pacific Livestock Co. and flowing northeasterly through the premises of all the parties hereto, except those of Duncan; that A. J. Morgan and C. W. Hinkey settled upon public lands near this spring, and in 1886 and the following year dug ditches and diverted water from the creek, which they respectively used on the premises claimed by them, and, having secured patents therefor, the title to such lands, by mesne conveyances, became vested in the corporation in 1900; that the plaintiff Loveland made a homestead entry on land below the premises so owned by the Pacific Livestock Co., and in 1886 diverted water from the creek with which he irrigated his land; that his brother, without any claim of right thereto, took possession of a section of land owned by the Oregon Central Military Road Co., and irrigated a part of it from the creek, which premises are now leased to the plaintiff last named, who was awarded 100 inches of water for the irrigation thereof; that E. W. Crutcher settled on public land situated below Loveland's, diverted water from the creek in 1895 for irrigation, and, having secured a patent for his land, conveyed it to the plaintiff Seaward; that defendant Duncan settled on government land situated below Seaward's premises, and dug a ditch from the stream mentioned, the head of which is above that of the latter's conduit, and diverted water for irrigation; and that the Pacific Livestock Co., in 1904, having built a dam in the creek nearer the spring and commenced to dig a ditch on higher ground, so as to irrigate more of its land than was then possible, this suit was instituted, resulting in a decree as hereinbefore indicated.

The plaintiffs' counsel admit that such corporation has a prior appropriation, but contend that errors were committed in awarding it more than 50 inches of water as the measure of its right, in not requiring the dam which it constructed to be removed, and in not enjoining the use of any water through the new ditch. The legal principles thus maintained are disputed by counsel for the Pacific Livestock Co., and they insist that errors were committed in awarding Loveland the use of any water from the

creek for the irrigation of the land leased to him, and in not permitting their client to use all the water of the stream, if necessary, in irrigating its lands. We will consider these questions in their inverse order.

1. An examination of the testimony discloses that from 1899, when Morgan and Hinkey respectively conveyed the real property which the Pacific Livestock Co. now owns, at the head of Crooked Creek, until 1904, a period of five years, there was no attempt made to increase the area of such arable land originally irrigated, and that during that time Loveland, Seawear and Duncan, respectively, appropriated water which the corporation continually permitted to flow in the channel of the stream to the head of their ditches. When an ordinarily prudent person makes a prior appropriation to irrigate arid land of which he is the owner, or in the lawful possession expecting to acquire title thereto, if such land will be benefited by irrigation, and the volume of the stream is sufficient therefor, it is reasonable to suppose that he has in mind both the extent of his land and the amount of the water at the time of his appropriation, and that he intends to reclaim the entire area thereof, either by the ditches constructed at the time or by a canal system then in contemplation. But pioneers on the public domain do not ordinarily possess great wealth, and hence cannot rapidly convert arid land into farms; and, such being the case, the law allows a reasonable time in which to complete the appropriation. If the increase in the area of arable land for the irrigation of which water has been diverted varies with and is measured by the lapse of time, the additional application of water annually to meet the augmented demand causes the appropriation to relate back to its inception, thereby cutting off all intervening rights of adverse claimants to the use of such water: *Simmons v. Winters*, 21 Or. 35 (27 Pac. 7; 28 Am. St. Rep. 727); *Hindman v. Rizor*, 21 Or. 112 (27 Pac. 13); *Cole v. Logan*, 24 Or. 304 (33 Pac. 568); *Smyth v. Neal*, 31 Or. 105 (49 Pac. 850).

2. What is a reasonable time in which to apply water originally intended to be used for some beneficial purpose depends

upon the magnitude of the undertaking and the natural obstacles to be encountered in executing the design: *Hindman v. Rizer*, 21 Or. 112 (27 Pac. 13); *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 85 (45 Pac. 472; 60 Am. St. Rep. 777). "The appropriator," says a text-writer, "must exercise that degree of diligence which will indicate the constancy and steadiness of purpose and labor usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs, and will manifest to the world a *bona fide* intention to complete the work without unnecessary delay": Long, Irrigation, § 41.

3. The testimony shows that Morgan and Hinkey were constantly enlarging the area of their arable land until 1899, when they executed deeds thereof; but from that time until 1904 their successors in interest made no attempt whatever to prepare any new land for cultivation, whereby a purpose to expand the appropriation might have been disclosed to persons who desired to make a subsequent use of the water. No cause is assigned for the delay indicated, and, believing it to have been unreasonable, the right of the Pacific Livestock Co. to the use of the water of the creek is limited to the appropriation made by its predecessors in interest, thereby rendering subsequent applications of the excess of such water by others valid: *Cole v. Logan*, 24 Or. 304 (33 Pac. 568).

4. The testimony shows that without any authority therefor one Ervin Loveland took possession of land owned by a military road company, constructed a ditch from the creek in 1888, and irrigated the premises each season until 1891, when he sold his interest therein to his brother, the plaintiff, who secured a lease of the land and was allotted by the decree 100 inches of water for its irrigation. When such use began the creek contained water that was subject to appropriation; and, this being so, should the irrigation of the land mentioned be continued? It was held by the Supreme Court of California that a trespasser on private land, who diverted water for the irrigation thereof, made the appropriation appurtenant to the premises benefited by the use: *Alta Land & W. Co. v. Hancock*, 85 Cal. 219 (24

Pac. 645; 20 Am. St. Rep. 217). The Supreme Court of Nevada, however, reached a different conclusion, and held that a trespasser on land could change the use made by him of water thereon to other real property: *Smith v. Logan*, 18 Nev. 149 (1 Pac. 678). In *Smith v. Deniff*, 23 Mont. 65 (57 Pac. 557; 50 L. R. A. 737), in construing the statute of Montana, it was held that the right to take water from or over the land of another was in the nature of an easement in gross, which might or might not be annexed or attached to land on which the water was used as an appurtenance thereto. In that case one Oscar Cosins, being in possession of land pursuant to a contract with a railroad company, the owner thereof, diverted water which he used in irrigating the premises. He mortgaged his interest in the real property, including the ditches and water rights, and, the lien having been foreclosed, the plaintiff secured a sheriff's deed of the property specified. The defendant, having obtained possession of the land, prevented the plaintiff from changing the use of the water to other lands, and in a suit to determine the rights of the parties it was adjudged that the sheriff's deed transferred the interest which Cosins had in the water right which was not an incident of or attached to the land that had been irrigated thereby. In that case it was stated in the original opinion that the water was used on the land by a tenant in possession of the premises; but on a rehearing it was observed that Cosins was in possession under a contract with the owner, the court remarking: "What the contract was does not appear." In Montana it was ruled that a lessee of land was entitled to appropriate water for use thereon: *Sayre v. Johnson*, 33 Mont. 15 (81 Pac. 389). The dictum of Mr. Justice STEELE of Colorado is to the same effect, for he says: "No reason is assigned in the brief of counsel why one who is the lessee of land may not own a water right, and we know of no reason why the lessee of land may not buy and hold a water right, or why a mere occupant of land may not become the owner of a water right, and use it himself or sell it to some one who will use it": *Cooper v. Shannon*, 36 Colo. 98 (85 Pac. 175). Whether or

not the right to use the water from the creek for irrigation is an incident to the land leased to Loveland, or is in the nature of an easement in gross which belongs to him as the tenant in possession of the premises, cannot now be determined, since the Oregon Central Military Road Co. is not a party to this suit, and hence could not be bound by any decree that might be rendered herein. The right, however, is probably owned by the landlord or by the tenant, and in either case, as the water is to be used for irrigating the demised premises, we think the court properly decreed an allowance therefor.

The spring which is the source of the creek mentioned supplies a constant stream, unvarying in the quantity of water that it discharges, which volume the court found to be 800 inches, miners' measurement, under 6 inches of pressure. There is undoubtedly a surplus of water after supplying the quantity decreed to the several parties, and, this being so, we do not see how the plaintiff can be injured by the maintenance of the enlarged dam or the diversion by the new ditch, as proposed by the Pacific Livestock Co. If the other parties secure the quantity of water allotted to them, they ought not to complain because of the proposed change in the use by the corporation.

A careful examination of the testimony convinces us that the quantity of water to which the several parties are entitled and the order of their respective rights to the use thereof are correctly stated by the court, and hence the decree is affirmed.

AFFIRMED.

Argued 12 March, decided 19 March, 1907.

WOLLENBERG v. SYKES.

89 Pac. 148.

PRINCIPAL AND AGENT—EFFECT OF NOTICE TO AGENT.

1. Notice to an agent as to matters over which he has authority is notice to the principal, but in this case there was no evidence whatever tending to show that the agent had any authority at all over the subject referred to in the notice.

BOND—ESTOPPEL ON SURETY TO DENY SIGNATURE.

2. Where a surety signed a bond and delivered it to the principal on condition that another surety be secured, and the bond, regular in appear-

ance, was delivered to the obligee without mention of the condition, the surety is estopped to deny the validity of his act, the obligee having disadvantageously changed his position in consequence of receiving the bond.

AGENCY—QUESTIONS FOR COURT AND JURY RESPECTIVELY.

3. The fact of agency is always for the jury, but what may be done by the agent is a question of law for the court.

In an action against the surety on an undertaking by a building contractor for performance of the contract, *held*, that whether the person assuming to act as plaintiff's architect was his agent, and, as such, authorized to act for him was a question for the jury; but whether it was within the scope of his authority, as such agent, to procure a surety for the contractor, was a question for the court.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. COMMISSIONER KING.

This is an action by Alfred Wollenberg against S. K. Sykes on an undertaking executed by J. W. Knapp, as principal, and defendant Sykes, as surety. The undertaking was given to secure the faithful performance of a builder's contract previously entered into between Knapp and Wollenberg, wherein it was stipulated that Knapp should construct a residence for plaintiff within a time and for a price specified, to be constructed in accordance with certain plans and specifications furnished by plaintiff's architect. The undertaking contained the usual provisions in instruments given for such purposes, to the effect that Wollenberg should be held harmless from all liens, damages and expenses which might be incurred, if occasioned through any fault or neglect of Knapp; the limit of liability therein being fixed at \$1,500. The instrument was executed by the principal and surety, without a seal, and witnessed by one D. P. Gingrich, and another. Gingrich was at the time in the employ of plaintiff as his architect, to prepare plans and specifications for the building and to supervise its construction, to the extent of seeing that it conformed to the plans and specifications furnished by him and as detailed in the contract, which agreement was also attached to and made a part of the undertaking. The contract, as well as the undertaking, was drawn by plaintiff's attorney, F. W. Benson, aided by plans and specifications prepared and furnished by Gingrich, as plaintiff's architect.

Through mistake, the contract in reference to the building was first signed by defendant in place of the undertaking. The attorney's attention being called to it, he placed the initials "S. K. S." in pencil writing before the place left for Sykes' signature, and dimly penciled the word "Seal" at the end of the lines where their signatures were to be, indicating that seals should be placed after their names when signed. The undertaking was then returned to Knapp and taken by him to defendant, who signed it as surety, after which it was delivered by Knapp to plaintiff. Plaintiff accepted it without knowledge of any conditions except those contained in and appearing upon the face of the instrument. Soon after its delivery to plaintiff, Knapp commenced the construction of the residence provided for in the contract; but, before its completion, abandoned the work, leaving a large indebtedness incurred in its construction. Liens were accordingly filed against the building to secure the unpaid claims, which plaintiff was compelled to discharge, and which, with the expense incurred in the completion of the building, was alleged to be the sum of \$1,098.10, for which judgment was demanded. *

The answer denied substantially all the allegations of the complaint, and, as an affirmative defense, alleged, in effect, that the undertaking was subscribed by defendant with notice to Gingrich and Knapp that another surety should be procured before it should be delivered; that the instrument, being unsealed, was not fully executed; that it was delivered without the required additional surety, and accepted by plaintiff with full knowledge of such conditions; and that by reason of the alleged facts the instrument is void. Other affirmative allegations are also set out in the answer, but are not urged here. The reply denied the allegations of new matter in the answer, and upon these issues the cause was tried.

Before submitting the case to the jury, the court was requested by plaintiff's counsel to instruct the jury to the effect that, under the evidence, it was not within the authority of Gingrich to bind plaintiff by any uncommunicated knowledge

or acts on his part relative to the conditions under which the undertaking may have been executed, nor to approve the instrument when signed; and that all testimony relative to what was said by defendant to Knapp and Gingrich concerning it should be disregarded. The instructions requested on these points were refused, to which counsel excepted, and the court, over plaintiff's objections and exceptions, charged the jury that they were the exclusive judges, not only of the question as to whether or not Gingrich was the agent of plaintiff in any capacity, but as to whether, as such agent, it was within his authority to procure and approve the undertaking given. A verdict was rendered for defendant, and from the judgment thereon the plaintiff appeals, assigning as error the refusal to give instructions asked and the giving of the instructions excepted to. REVERSED.

For appellant there was a brief over the names of *W. F. Benson* and *Albert Abraham*, with an oral argument by *Mr. Abraham*.

For respondent there was a brief over the name of *Coshow & Rice*, with an oral argument by *Mr. Oliver Perry Coshow*.

Opinion by MR. COMMISSIONER KING.

The instrument upon which this action is brought, strictly speaking, is what is termed an "undertaking." It is a simplified bond without a seal: 29 Am. & Eng. Enc. Law (2 ed.), 98; *Scherer v. Hopkins*, 42 N. Y. St. Rep. 189 (16 N. Y. Supp. 863). The question as to the effect of it being an unsealed instrument is not urged here, and, under the issues involved, is not material, except in so far as it may explain the effect of certain testimony given at the trial. The jury found from the evidence, under the law as given them by the court, that Gingrich was plaintiff's agent, and that, as the terms of such agency empowered him to prepare plans and specifications for the building, including the supervision of its construction, it was within the scope of his authority to look after the preparation of the undertaking and approve the same when signed by the principal and surety. The only point necessary for consideration is as to whether the question of the extent of Gingrich's authority, under the evidence,

should have been submitted to the jury. After a careful examination of the bill of exceptions, we find no evidence showing any authority in Gingrich to act in any other capacity than as architect in the construction of plaintiff's residence. As such, he was authorized to draw plans and specifications, submitting them to plaintiff's attorney for preparation of the contract and bond, and to see that the building, as completed, should conform to the necessary requirements. It appears he was present when the instrument sued on was signed, and that he also witnessed it. The defendant testified that he told Knapp and Gingrich, when he signed the bond, or undertaking, that another surety must be procured, or he would not be bound by it, but no evidence appears showing plaintiff had any knowledge of such statement when he accepted the instrument. It was delivered to the plaintiff by the principal, and nothing appears upon its face, tending in any manner to indicate that another signature was to be procured. Only the defendant's name appears in the body of the instrument as surety, with nothing to indicate that any other name was to be inserted in or signed thereto.

1. It is practically conceded that, unless there was some evidence offered tending to show Gingrich had authority both to secure and to approve the undertaking intended to be obtained, the plaintiff is not bound by notice given to, or knowledge had by, Gingrich in reference to any additional requirements concerning the instrument, unless such information is shown to have come to plaintiff's knowledge. And it is well settled that while notice to an agent, when acting within the scope of his authority, is notice to the principal, it is equally well settled that to constitute such notice, and bind the principal, it must relate to matters over which his authority extends: *Pennoyer v. Willis*, 26 Or. 1 (36 Pac. 568; 46 Am. St. Rep. 594).

On this point, it is urged by defendant's counsel that the showing made at the trial, to the effect that Gingrich was plaintiff's architect, drew the plans for the building, supervised its construction, furnished his attorney with data for the preparation of the papers, and witnessed the instrument, together with plain-

tiff's statements on cross-examination, constituted sufficient evidence to bring the question of the selection of the sureties and the approval of the undertaking within the power conferred by such agency, and that this question was properly submitted to the jury. The testimony relied on was as follows:

"Q. Mr. Wollenberg, who represented you in drawing up these plans and contract?

A. Mr. Gingrich.

Q. He was your architect and agent in this matter?

A. Yes, sir.

Q. He superintended the entire construction of the building?

A. Yes, sir.

Q. These several men that you testified as having been paid after Mr. Knapp left his contract, did Mr. Gingrich oversee all these?

A. Yes, sir; he gave orders for the payment."

Mr. Benson, plaintiff's attorney, testified to the effect that he drew the bond and contract at the suggestion, principally, of Gingrich and Knapp, and that Wollenberg was there a part of the time; that Gingrich suggested some of the terms, but the amount of the bond was determined by Wollenberg and fixed at \$1,500. No other testimony was given on these points, and it further appears, without contradiction, that all the information furnished by Gingrich for the formulation of the contract and of the undertaking was submitted, and that the papers were prepared and approved by Wollenberg, before either instrument was signed, which was not done in his presence. In explanation of his response to the question asked him on cross-examination, when the words "architect and agent" were used, plaintiff stated, on redirect examination:

"I did not understand the question right. I did not hear the word agent. I only admit he was my architect."

He further stated Gingrich was not his agent for any other purpose. Taking his testimony as a whole, with the language used in the questions asked, it cannot be inferred that plaintiff intended to be understood as saying Gingrich had any other authority than that of an architect. The question relied upon

which elicited this answer merely asked the witness as to who represented him in drawing up the "plans and contract." The question did not refer to the undertaking, or "bond." In the trial the terms generally made use of were "contract," when referring to the agreement between Wollenberg and Knapp, including the plans for the building, while the word "bond" was used in referring to the undertaking upon which this action is founded. Then, when analyzed under the most favorable light for the defendant, the plaintiff's reply to the question could not have been intended to have any reference to the undertaking.

2. No evidence having been offered showing the undertaking to have been accepted by plaintiff with either actual or constructive notice of the conditions under which it is alleged to have been executed, it can make no difference whether or not it was delivered by Knapp contrary to instructions, for the defendant, having affixed his signature and intrusted the writing to the control and possession of the principal, it being regular on its face, clothed him with authority to make the final delivery to the obligee, and, having delivered it, the defendant is bound, on the principle of estoppel, as by his acts plaintiff was misled to his injury: *Baker County v. Huntington*, 46 Or. 275 (79 Pac. 187).

3. The question whether or not Gingrich, as plaintiff's architect, was his agent, and, as such, authorized to act, is not questioned, and, if it had been controverted, would have been a question to be submitted to the jury; but whether it was within the scope of his authority to procure or approve sureties on a bond, or undertaking, was a question for the court: *Connell v. McLoughlin*, 28 Or. 230 (42 Pac. 218); *Long Creek Build. Assoc. v. State Ins. Co.* 29 Or. 569 (46 Pac. 366). The existence of an agent's authority is one of the facts to be determined by the jury, but what acts come within the conferred power is a question of law for the court's determination: *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215).

The instructions requested, to the effect that plaintiff was not bound by anything claimed to have been said by defendant to

Knapp and Gingrich, relative to the conditions under which the undertaking was alleged to have been signed, and that the testimony to that effect be disregarded, should have been given; and the instructions given erroneously submitted both the law and the facts to the jury. The judgment should therefore be reversed.

REVERSED.

Argued 23 January, decided 19 March, 1907.

CHRISTIAN v. EUGENE.

89 Pac. 419.

STREETS—PLATTING AND SELLING AS A DEDICATION.

1. Where the proprietor of lands lays out a town thereon in the manner provided by statute, platting the same into blocks and streets, and the plat is duly executed, acknowledged and recorded, and he sells lots therein with reference thereto, he thereby dedicates the streets to the public irrevocably.

SELLING AND BUYING LOTS AS ACCEPTANCE OF A STREET.

2. The selling of lots in a tract of platted land by the original lot proprietor, and the corresponding purchase by numbers of the public at large, amount to an acceptance of the streets shown on the plat without formal action by the authorities.

DEDICATION—CLAIM OF MISTAKE—ENJOINING USE OF STREETS.

3. Where land has been platted and lots sold with reference thereto, the dedicator cannot enjoin the public authorities from using the streets shown on such plat, because there was a mistake in the plat, for such an error can be rectified only by a suit for that purpose, to which all the persons interested must be made parties—no collateral attack on the plat will be permitted.

EFFECT OF ADVERSE POSSESSION OF STREETS.

4. By the express provision of Section 4820, B. & C. Comp., as well as by the weight of reason and authority, adverse possession of dedicated streets or alleys does not run against municipal authorities, though, by reason of particular circumstances, equitable estoppels are sometimes enforced against municipalities as to particular parcels of ground.

STREETS—EQUITABLE ESTOPPEL AGAINST OPENING.

5. The evidence in this case does not show such equitable considerations as to justify a court of equity in depriving the citizens of the city of the use of the street in question: *Schooling v. Harrisburg*, 42 Or. 494, distinguished.

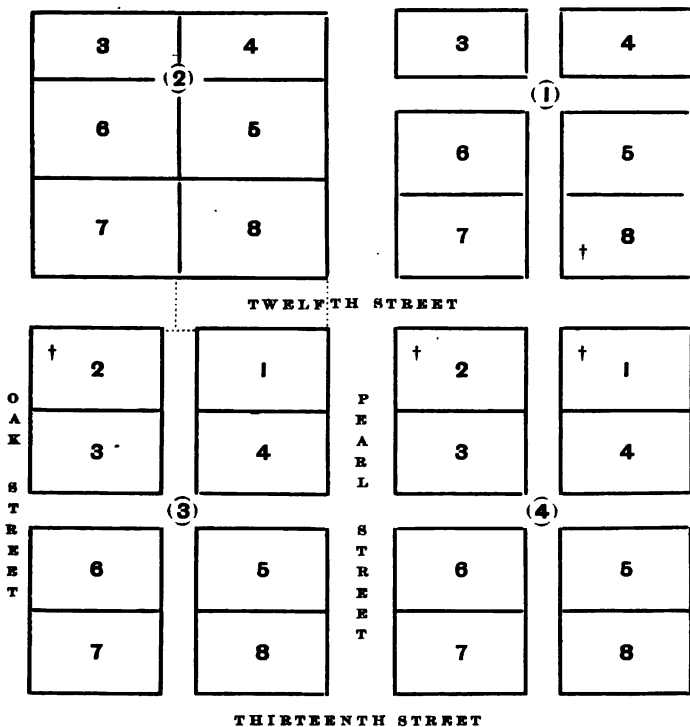
NEED OF PLEADING ESTOPPEL.

6. In order to render an estoppel available it must be pleaded if there is an opportunity to do so.

From Lane: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by Etha Christian, for whom was substituted J. W. Christian, her executor, against the City of Eugene and another as street commissioner thereof to enjoin the defendants from opening as a street what is claimed by the defendants to be a part of Twelfth Street in Christian's Addition to the City of Eugene. On November 18, 1884, Catherine Christian was the owner of the lands covered by what is now known as "Christian's Addition to Eugene City," and on that day she and her husband, D. R. Christian, made and executed under seal a plat of the said ground, designating it on the plat as "Christian's Addition to Eugene City," which was duly witnessed and acknowledged and duly recorded. The said plat is as follows:



Lot 2 of block 3, lots 1 and 2 of block 4, and lot 8 of block 1, all opening on Twelfth Street, were sold and conveyed by Catherine Christian and D. R. Christian, between July, 1885, and June, 1888, and are described in the conveyances with reference to said plat. The portion of Twelfth Street now in controversy lies between lot 8 in block 2 and lot 1 in block 3. At the time of the platting of said ground as above set out, said lot 8 in block 2 and part of said Twelfth Street adjacent thereto were occupied by the dwelling and buildings of Catherine and D. R. Christian, and the portion of said street now in controversy was not open to the public prior to the acts of defendants complained of in this suit. By the complaint plaintiff seeks to recover upon her allegation of ownership. The answer sets up the platting and dedication of the street, and the sale of lots with reference to such plat. By the reply plaintiff denies the dedication of Twelfth Street between blocks 2 and 3, and also alleges adverse possession for 10 years, and alleges that the plat is erroneous in so far as it dedicates Twelfth Street between blocks 2 and 3, and the main contention of the plaintiff upon the trial was to show the error in the plat and dedication, and adverse user for more than 10 years, as conferring title as against the dedication; plaintiff having acquired said lots by descent from said Catherine and D. R. Christian.

AFFIRMED.

For appellant there was a brief over the names of *Walton & Ness* and *Harbaugh & Bower*, with an oral argument by *Mr. Sjur P. Ness*.

For respondents there was a brief over the names of *L. E. Beun*, City Attorney, and *John Monroe Williams*, with an oral argument by *Mr. Williams*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. When the proprietor of lands lays out a town thereon in the manner provided by the statute, platting the same into blocks, streets and alleys, and the plat is duly executed, acknowledged and recorded, and he sells lots therein with reference thereto, he thereby dedicates said streets and alleys to the public, and the same is irrevocable.

2. The purchase of lots with reference to such plat constitutes a sufficient acceptance by the public of such dedication. It was held in *Spencer v. Peterson*, 41 Or. 257 (68 Pac. 519, 1108), that, if lots are sold with reference to such plat, no acceptance or user by the public is required. To the same effect is *Meier v. Portland Cable Ry. Co.* 16 Or. 500, 507 (19 Pac. 614: 1 L. R. A. 856), where it is said: "The location of the townsite, the number and extent of the streets, and the belief of the purchasers that they will remain permanent and perpetual, are material inducements to the purchase." Therefore plaintiff is bound by the plat as executed and recorded, unless an error is shown in the plat or the public has lost its rights therein by adverse user.

3. Plaintiff seeks, however, to establish an error in the plat by parol evidence that it was not the intention of the proprietor to dedicate Twelfth Street. But the correctness of the plat cannot be collaterally attacked. The plat is as much a part of the evidence of the title of the purchaser of lots as his deed, and cannot be changed or disputed by the proprietor as his interests may suggest. In *Steel v. Portland*, 23 Or. 176, 183 (31 Pac. 480), it is said: "The sale and conveyance of lots according to such plan or map implies a covenant that the streets and other public places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map upon the faith of which the lots are sold." And in *Meier v. Portland Cable Ry. Co.* 16 Or. 500 (19 Pac. 614: 1 L. R. A. 856), it is said "that he (the proprietor) intends it to be irrevocable is beyond the possibility of a doubt."

Section 2738, B. & C. Comp., provides:

"Every donation or grant to the public, including streets and alleys * * marked and noted as such on the plat of the town * * shall be considered to all intents and purposes as a general warranty to the said donee."

"Warranty" is "an engagement or undertaking, express or implied, that a certain fact regarding the subject of a contract is, or shall be, as it is expressly or impliedly declared or promised to be" (Webster's Int. Dict.), and the execution, acknowledg-

ment, and recording of the plat are equivalent to a conveyance to the public of the streets and alleys, and a mistake in the description, terms or platting thereof can only be corrected or established by a proceeding in equity for that purpose, to which all persons interested in the result are parties. Hence plaintiff is bound by the dedication here as designated on the plat, and cannot be relieved therefrom in this suit upon parol evidence of a mistake.

4. To meet the defense of the dedication of Twelfth Street by Catherine and D. R. Christian alleged by defendants, plaintiff, in her reply, alleges adverse possession of the land for more than 10 years. The weight of the adjudged cases seems to be that since the municipal authorities have no right to sell, alienate or dispose of streets or alleys dedicated to the public, except in some manner provided by law, the statute of limitations will not run against them: *Ralston v. Weston*, 46 W. Va. 544 (33 S. E. 326: 76 Am. St. Rep. 834). This court has also recognized this rule in *Schooling v. Harrisburg*, 42 Or. 494, 499 (9 Mun. Corp. Cas. 705: 71 Pac. 605), and *Oliver v. Synhorst*, 48 Or. 292 (7 L. R. A., NS, 243: 86 Pac. 376), and it is expressly adopted in this state by statute (Section 4820, B. & C. Comp. enacted in 1895, and re-enacted in 1903; Laws 1903, p. 279), so that plaintiff has acquired no rights by adverse user or the statute of limitations.

5. And neither the allegations nor the proof bring the plaintiff within the rule of estoppel *in pais*, as laid down in *Schooling v. Harrisburg*, and *Oliver v. Synhorst*.

6. Estoppel, to be available, must be pleaded, if there is an opportunity to plead it, and it is not pleaded here, and the proof must be something more than of the lapse of time or adverse occupancy. Some equity must have arisen in favor of one pleading such estoppel of such a character that justice requires that an equitable estoppel shall be asserted against the public. It follows that the decree of the lower court should be affirmed, and it is so ordered.

AFFIRMED.

Argued 7 February, decided 26 March, 1907.

FREEMAN v. PRESTON.

89 Pac. 375.

APPEAL—PRESUMPTIONS—TRIAL.

1. Where a court has made findings in accordance with the averments of the complaint, ignoring an amended answer, and certified in the bill of exceptions that the parties introduced evidence maintaining the allegations of their pleadings, the court on appeal must conclude, in view of the presumption under B. & C. Comp. § 788, subd. 15, that official duty has been regularly performed, that no permission was granted to file the amended answer, though it stated that it was filed by leave of court.

SAME—RECORD—SUFFICIENCY.

2. Where the abstract on defendant's appeal did not contain a reply to an amended answer, which could not have been interposed without leave of court, it devolved on defendant to set out the order granting leave, and on his failure to do so he could not complain that the court erred in ignoring the amended answer.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. JUSTICE MOORE.

This action was commenced May 19, 1905, to recover money. The complaint states that on April 11, 1905, the defendant, R. A. Preston, ordered from the plaintiff, I. Freeman, a cash register, agreeing to give therefor \$305, paying at that time \$10, and stipulating to pay a like sum on the eleventh of each month thereafter until the purchase price was fully discharged; that it was also agreed that if default should be made in the payment of any installment as it matured, the remainder of the consideration should at once become due and payable, and the sale of the register absolute; that the plaintiff delivered the register to the defendant who paid on account thereof the sum of \$10 only, but on May 11, 1905, when the second installment matured, he, upon a demand therefor, refused to pay any part thereof, whereupon the remainder immediately became due and payable, and judgment is demanded therefor. The cause was tried October 20, 1905, without the intervention of a jury, and findings of fact and of law were made in accordance with the averments of the complaint, and judgment having been rendered thereon against the defendant for the sum of \$295, he appeals.

AFFIRMED.

For appellant there was a brief over the names of *Arthur Carpenter Emmons* and *Géorge J. Cameron*, with an oral argument by *Mr. Emmons*.

For respondent there was a brief with an oral argument by *Mr. Marion Baker Meacham*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. The abstract upon which the cause was tried in this court in lieu of a transcript sets out what purports to be a copy of an amended answer that shows it was filed on the day of the trial and states on the face of the pleading that it was done "by leave of court first had and obtained," etc. This answer denies each allegation of the complaint, and interposes thereto five separate defenses. No reply to such averments of new matter appears to have been filed, and the court in its findings ignored the amended answer. The plaintiff's counsel asserts in his brief that the separate defenses were disregarded, because it did not appear that leave was given to file the amended answer. The court certifies in the bill of exceptions that the parties introduced evidence at the trial tending to maintain the allegations of their pleadings and to support the respective issues made thereby. This declaration is compatible with the idea that the cause was tried on the issue made by the original answer, which, it is assumed, only denied the allegations of the complaint. Invoking the disputable presumption that official duty has been regularly performed (B. & C. Comp. § 788, subd. 15), we must conclude, from the findings of fact, that no permission was granted to file the amended answer.

2. Though the plaintiff's counsel, if he had considered the abstract filed herein incomplete, might have furnished such further or additional abridgement of the record of the cause as he deemed necessary to a full understanding of the questions involved on the appeal (Rule No. 5 of the Supreme Court, 35 Or. 587, 592), he could not have been expected to prove a negative; and as no reply to the amended answer appears in the abstract whereby permission to file the latter pleading was waived, and

as such answer could not have been interposed without the court's consent, the necessity of setting out an order to that effect devolved on the defendant's counsel, and, failing in this respect, we believe no error was committed in making the findings of which they complain.

It follows, from these considerations, that the judgment should be affirmed, and it is so ordered. **AFFIRMED.**

Argued 27 February, decided 26 March, 1907.

WRIGHT v. CONSERVATIVE INVEST. CO.

89 Pac. 387.

TRUSTS—SUIT BY TRUSTEE—COLLATERAL ISSUES BETWEEN BENEFICIARIES.

1. In a suit by a trustee to foreclose a mortgage made to her in her trust capacity, collateral issues between the beneficiaries as to matters between themselves, and not going to the merits of the suit, should not be permitted, and if such issues do appear in the pleadings, they should be ignored in the findings.

TRIAL—RIGHTS OF ABSENT PARTIES.

2. Questions affecting the rights of persons not parties to a suit should not be tried until such persons have been brought in.

MORTGAGES—FORECLOSURE—REQUIRING STATEMENT OF CLAIM OF INTEREST BY DEFENDANTS.

3. An allegation in a complaint for the foreclosure of a mortgage that defendants each have or claim some interest or right in or to the mortgaged premises, but that plaintiff's mortgage lien is prior in date and superior in equity thereto, is sufficient to require a disclosure of their claim by the defendants on penalty of being forever barred.

MORTGAGE FORECLOSURE—RIGHT OF DEFENDANT CLAIMING INFERIOR LIEN TO BE DISMISSED.

4. A defendant who has admitted in a foreclosure suit that she claims an interest in the mortgaged property is not entitled to be dismissed; but, on the contrary, plaintiff is entitled to an adjudication on the rank of such claim.

MORTGAGE FORECLOSURE—ALLOWING ATTORNEY'S FEES.

5. The amount to be allowed as an attorney's fee on a note is a question of fact, and either the judge or jury, as the case may be, is bound by the testimony and cannot arbitrarily disregard undisputed evidence.

Plaintiff, in an action to foreclose a mortgage, having supported the allegation of the complaint, that \$50 was a reasonable attorney's fee for the foreclosure, by testimony of an attorney of experience, and there being no evidence to the contrary, the court may not disregard such testimony and allow a smaller sum, the determination of the issue not being in the discretion of the court.

MORTGAGE FORECLOSURE—INTEREST ON TAXES PAID.

6. A mortgagee, in a suit to foreclose a mortgage, is entitled to interest on taxes paid by her on the mortgaged land during the life of the lien before foreclosure.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. COMMISSIONER SLATER.

Plaintiff sues as trustee of C. Meng to foreclose a mortgage on certain real property in Douglas County given by defendants, the Conservative Gold Mining Investment Co. and the Jordan Creek Mining & Water Power Co., to appellant, designated therein as "trustee," to secure their promissory note to the same effect, dated May 20, 1903, which provides for the payment of a reasonable attorney's fee for the collection thereof. A. Rowley and Isabella Rowley are also parties defendant. In addition to the usual allegations, plaintiff alleges, in effect, that she is the trustee of C. Meng, and as such the note and mortgage belong to her; that each of the defendants claims some interest in the mortgaged premises inferior and subsequent to her mortgage; that on September 2, 1904, she paid \$2.95, taxes on the premises for the year 1903, and on July 29, 1905, \$3.21, taxes for the year 1904, which had not been repaid to her; and that \$50 is a reasonable attorney's fee for the foreclosure of the mortgage. The prayer of the complaint is for a recovery of the amount of the note, the said taxes paid, with interest thereon from date of payment, and the said attorney's fees; and for a foreclosure of the mortgage against all the defendants.

The defendant corporations answered jointly, denying all the material allegations of the complaint, except the making of the note and mortgage and its non-payment, and affirmatively alleged that plaintiff was trustee for C. Meng and Isabella Rowley, jointly, setting forth the facts creating the trust relationship and the respective interests of C. Meng and Isabella Rowley therein. The remaining defendants answered separately to the same effect, excepting they did not deny the payment of the taxes by plaintiff. The reply denied the allegations of new matter in the answer, and alleged that C. Meng purchased at execution sale the alleged interest of Isabella Rowley in said

note. Findings were made to the effect that, in addition to the admissions in the pleadings, the sum of \$30 was a reasonable attorney's fee for the foreclosure of the mortgage; that C. Meng was not the owner of Isabella Rowley's interest in said note and mortgage; that plaintiff was entitled to a foreclosure of the mortgage against all the defendants; but that Isabella Rowley was entitled to a dismissal of the suit as to her, and also to costs and disbursements. A decree in accordance therewith was entered, from which plaintiff appeals. MODIFIED.

For appellant there was a brief with an oral argument by *Mr. Robert Catlin Wright*.

For respondent there was a brief over the names of *William Mosby La Force* and *Albert Abraham*.

Opinion by MR. COMMISSIONER SLATER.

1. This is a suit by a trustee of an express trust to foreclose a mortgage made in her name for the benefit of others, and by the provisions of Section 29, B. & C. Comp., she can maintain the suit without joining the persons for whose benefit the suit is prosecuted: *Holladay v. Davis*, 5 Or. 40; *Considerant v. Brisbane*, 22 N. Y. 389. The object of the suit is to reduce to the possession of the trustee the subject-matter of the trust so as to enable her to make thereafter an accounting with the beneficiary or beneficiaries of the trust, and it in no way affects the trustee's relation with her *cestuis que trustent*, and for that reason it is not necessary that the latter be made parties: 22 Enc. Pl. & Pr. 163. The collateral issues, therefore, attempted to be made by the pleadings as to who were the beneficiaries of the trust, and the present interest of either therein, are entirely foreign to the object of the suit, and should have been disregarded by the court as immaterial.

2. Nor, in any event, could such issues have been legally determined as against C. Meng, an alleged beneficiary, without having made him a party, which was not done.

3. The decree was in plaintiff's favor for the recovery of the amount of the note, the taxes, without interest, and \$30, attor-

ney's fee, and for the foreclosure of the mortgage against all the defendants except Isabella Rowley, but as to her the suit was dismissed with judgment in her favor for costs. The principal objection made by plaintiff to the decree is that the suit was dismissed as to Isabella Rowley. She was made a party defendant, evidently, not because of any claim by her of an interest in the note and mortgage, the subject of the suit, and which claim of interest was attempted to be litigated by the parties and determined by the court, but because she had or claimed to have some interest in or lien upon the mortgaged property. In order that the foreclosure might be complete and a perfect title transferred by the sale, it is necessary that the holder of every such right or interest should be brought before the court: 2 Jones, Mortgages (4 ed.), § 1394; Pomeroy, Code Rem. (4 ed.), § 239, *342. The allegation of the complaint is:

"The defendants, each or all of them, have or claim some interest, equity, right, estate or claim in or to the land described in said mortgage, but plaintiff's said mortgage lien thereon is prior and superior to any lien, claim, estate, right or equity of the defendants in or to the said lands or of either of defendants therein."

This is a sufficient allegation on the part of the plaintiff to require each defendant to appear and disclose whatever interest or claim he may have or be forever barred from thereafter asserting it: *Horton v. Long*, 2 Wash. 435 (27 Pac. 271; 26 Am. St. Rep. 867).

4. The defendant Isabella Rowley by her answer failed to deny this allegation of the complaint, and thereby she admitted the truth of the facts therein set forth: B. & C. Comp. § 95. Having admitted that she has or claims to have some interest in or lien upon the mortgaged premises and that such interest or claim is subsequent and inferior to plaintiff's mortgage, she was not entitled to a dismissal of the complaint, nor to recover her costs and disbursements, but the plaintiff is entitled to a foreclosure against her as well as against the other defendants.

5. Objection is also made to the allowance of only \$30 for attorney's fees, and plaintiff claims that she is entitled to the

full sum alleged and claimed in the complaint, to wit, \$50. The answer of the defendant corporations by a form of general denial has put that allegation of the complaint in issue. This is an issue of fact that must be resolved and determined by the evidence in the same manner as any other question of fact. When there is an issue in the pleadings as to what is a reasonable attorney's fee, some evidence must be introduced on the subject to sustain an allowance of any sum beyond the amount fixed by statute (*Bradtfeldt v. Cooke*; 27 Or. 194: 44 Pac. 1: 50 Am. St. Rep. 701), and such testimony must be presented to the jury, and it is their right to determine that as they do other disputed questions of fact, so that the court cannot include in a judgment an allowance for attorney's fees when the jury did not fix the amount in their verdict: *Fiore v. Ladd*, 29 Or. 528 (46 Pac. 144). To the same effect is *First National Bank v. Mack*, 35 Or. 122 (57 Pac. 326). To sustain the issue on plaintiff's part, R. C. Wright testified as follows:

"I am an attorney of the Supreme Court of the State of Oregon, and have practiced since 1890 in the state, and \$50 is a reasonable attorney's fee to be allowed the plaintiff for the expense and trouble of this suit, and especially so as it has been necessary to send an attorney from Portland."

No other testimony was offered by either party on this question, and, in our opinion, it is sufficient to make a *prima facie* case for the plaintiff. But the lower court disregarded the effect of this testimony, and, presumably based upon its own knowledge as to what is a reasonable fee, allowed only \$30. The determination of the issue, however, is not within the discretion of the court, but whatever finding is made thereon must be the legal effect of the evidence. In this instance the only evidence being that on the part of the plaintiff tending to establish the amount alleged as the reasonable value of the attorney's fee, the court was legally bound to find that amount, and could not in its own discretion find a smaller amount.

6. Plaintiff also claims interest at the legal rate upon the taxes paid by her, and as to her right to such interest we have no question.

The decree, therefore, should be modified accordingly.

MODIFIED.

Argued 29 January, decided 12 March, 1907.

BOWER v. BOWSER.

88 Pac. 1104.

REFORMATION OF INSTRUMENTS—BURDEN OF PROOF.

1. Written instruments will not be reformed for mistake unless such mistake is clearly shown to have been mutual, and on that point the plaintiff has the burden of proof. In the present instance the evidence does not clearly show that there was a mistake.

HOP CONTRACT—SPECIFIC PERFORMANCE—EXECUTORY CONTRACT.

2. A contract by a hop grower to sell a stated number of pounds of hops each year for a given number of years, to be grown on certain described real property, is an executory agreement for the sale of personal property, and no title passes to the purchaser until delivery and acceptance, so that no interest is thereby created in the land or growing crops which can be enforced against a subsequent purchaser of the real property who does not assume the contract.

From Marion: WILLIAM GALLOWAY, Judge.

Suit for reformation of a written instrument and specific performance of it when reformed. Plaintiffs appeal from the decree dismissing the complaint.

AFFIRMED.

For appellants there was a brief over the names of *Teal & Minor, W. M. Kaiser* and *Woodson Taylor Slater*, with oral arguments by *Mr. Wirt Minor* and *Mr. Slater*.

For respondent there was a brief over the names of *W. H. and Webster Holmes*, with oral arguments by *Mr. William Henry Holmes* and *Mr. George Greenwood Bingham*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to reform a deed. On October 31, 1901, the plaintiff Bower and his coplaintiff, *Livesley & Co.*, entered into a contract by which he bargained and sold and agreed to deliver to them 10,000 pounds of hops at 10 cents a pound, during each

of the years from 1902 to 1906, inclusive, to be grown on certain described real property. Livesley & Co. were to make certain advances each year for cultivating and picking purposes, which advances were to bear interest at the rate of 8 per cent per annum and to be a lien upon the crop, and upon the delivery Livesley & Co. were to pay the balance due thereon. Bower was to cultivate, cure, bale and deliver the hops to them f. o. b. the cars at such time between the 1st and 31st of October of each year as they might direct. The hops were to be insured by him in their favor from the time of picking until delivery, and in case of loss before delivery he was to repay to them all the sums so advanced with interest. On March 28, 1903, Bower sold and conveyed the premises described in the contract to the defendant, Bowser, who thereafter refused to comply therewith so far as it related to the sale and delivery of hops grown on the premises after the date of his conveyance. In June, 1904, Bower and Livesley & Co. brought this suit to reform the deed and to enforce specific performance of the hop contract, alleging that defendant agreed as a part of the consideration for the purchase of the land to assume and perform such contract, but by mutual mistake of the parties the agreement was omitted from the deed. The denial of these averments presents the question for our decision.

The testimony upon this point is conflicting. The plaintiff Bower testified that, during the negotiations for the sale of the land by him to the defendant, the latter inquired about the terms of the hop contract with Livesley & Co. and agreed to take it off his hands; that, at the time he (defendant) notified him that he would take the land, he said he did not like the idea of complying with the hop contract, and would beat it if he could, but if not would comply with it; that nothing was said between them about inserting a provision in the deed to the effect that defendant assumed and agreed to perform the hop contract, or that the deed was to be made subject thereto; that he did not think it necessary to have any such stipulation in the deed, as he supposed the agreement between him and the defendant was

sufficient, and would be binding; that Mr. Adams prepared the deed, and nothing was said to him about the hop contract or defendant's assuming the performance thereof. Daais, a witness for plaintiffs, testified that, about the time the deed was made, he met defendant, and inquired if he had assumed the hop contract, and defendant replied that he had bought subject to such contract. Roberts, one of the plaintiffs, says that during the year 1903 defendant told him that he had assumed the hop contract, but would not comply with it unless he was compelled to do so. Adams, who drew the conveyance, testified that it was a general warranty deed, made subject to a mortgage, and that nothing was said to him by the parties about the hop contract. Dr. Armstrong overheard a conversation between Bower and the defendant in Adams' bank about the time the deed was prepared, or while it was being prepared, and Bower said that the hop contract should go with the deed, but defendant replied: "Not much. I will not accept it." Then Adams, overhearing the others, remarked: "If there is any further covenant to be in the deed, it must be inserted now," and Bower replied: "Nothing more." The defendant, Bowser, testified that, during the negotiations between him and the plaintiff Bower for the sale and purchase of the land, he inquired about the hop contract, its terms and conditions, and Bower undertook to state them to him, and, among other things, said that the contract contained a provision that it should terminate in case of the sale of the land; that defendant said that he had never seen a hop contract, and would have to see the one in question before agreeing to accept it, but if it did contain what plaintiff said it did, and nothing further objectionable, and he would deliver to witness a copy within the time to make out a deed, he would accept it, but that he could not delay the matter longer; that Bower did not produce or furnish a copy of the contract, and that he never agreed to assume it otherwise; that there was no mistake in the deed, but that it was made out in strict accordance with the contract, and just as he intended it should be.

From his summary it appears that there is a conflict in the

evidence as to whether defendant agreed to assume and perform the hop contract. Bower, testifying generally, says that such was the understanding and agreement; but he also says that, when defendant finally notified him that he would take the land, he said that he did not like the hop contract, and would not comply with it unless compelled to do so. Defendant denies that he ever agreed to assume the contract, except on condition that Bower should furnish a copy before the deed was executed, and that its terms and conditions were found to be as represented. The other testimony tends only to corroborate the evidence of one or the other of these witnesses, and in our opinion the alleged mistake is not made out by that clear and satisfactory proof requisite in suits to reform written instruments on the ground of mutual mistake. It is but a fair inference from the entire testimony that the matter of assuming the hop contract was discussed between Bower and the defendant, and that no definite certain agreement was ever reached in relation to the matter, and the evidence all shows that there was no mistake in the deed sought to be reformed, but that it expressed the intent of the parties correctly. Bower testifies that he never thought of having the alleged agreement with the defendant to assume and perform the hop contract inserted in or made a part of the deed, and the defendant says that the deed as drawn and delivered is just as he intended it should be. Under these circumstances, a court of equity would not be justified in decreeing a reformation of the instrument.

1. It has long been settled that a written instrument will not be reformed on the ground of mistake, unless the mistake is mutual, and be established by clear and satisfactory proof: *Epstein v. State Ins. Co.* 21 Or. 179 (27 Pac. 1045); *Mitchell v. Holman*, 30 Or. 280 (47 Pac. 616); *King v. Holbrook*, 38 Or. 452 (63 Pac. 651). The evidence here does not satisfy these requirements.

2. The plaintiff contends, however, that, whether the defendant agreed to assume the hop contract or not, he had express notice thereof at the time he purchased the land from Bower,

and therefore took subject to such contract, and must perform the same. This contention, as we understand, proceeds on the theory that the contract between Bower and Livesley & Co. for the sale and purchase of the hops created an interest or charge upon the land, valid as against a subsequent purchaser with notice, which a court of equity will specifically perform as against such purchaser. But hop contracts of the kind now under consideration are merely executory agreements for the sale and delivery of personal property, and no title to the commodity passes to the purchaser until delivery and acceptance: *Backhaus v. Buells*, 43 Or. 558 (72 Pac. 976, 73 Pac. 342); *La Vie v. Tooze*, 43 Or. 590 (74 Pac. 210). If no title or right to the possession of the hops passed by the agreement, prior to delivery, it necessarily follows that no interest, equitable or otherwise, was created in the land or the growing crops, which can be enforced against a subsequent purchaser who does not assume the contract.

The decree is affirmed.

AFFIRMED.

Argued 12 March, decided 9 April, 1907.

CELLERS v. MEACHEM.

10 L. R. A. (N. S.) 133: 89 Pac. 426.

BILLS AND NOTES—EFFECT OF SIGNING AS SURETY.

1. One of several signers of a promissory note does not affect his primary liability thereon by adding the word "surety" to his signature, though it may affect the relative rights of the signers between themselves.

BILLS—ACCOMMODATION MAKER—KNOWLEDGE OF HOLDER.

2. That a joint maker of a negotiable note signed solely for the accommodation of his comaker, which was known to a transferee when he purchased, is not a defense, under the Negotiable Instruments Act: B. & C. Comp. § 4431.

NOTES—LIABILITY OF ACCOMMODATION MAKER AFTER EXTENSION OF TIME WITHOUT HIS KNOWLEDGE.*

3. Under the Negotiable Instruments Act (Laws 1899, pp. 18, 44, B. & C. Comp. §§ 4431, 4521, 4522, 4592), defining an accommodation maker, and

*NOTE.—See note in 10 L. R. A. (N. S.) 129, effect under negotiable instruments law of extension of time to principal to release one who, on the face of the instrument, is primarily liable, but who is in fact a surety.

making him liable on the instrument to a holder for value, and providing that a negotiable instrument is discharged by payment, etc., an accommodation maker of a note is not relieved from liability by an extension of time of payment without his consent.

From Douglas: LAWRENCE T. HARRIS, Judge.

Statement by MR. COMMISSIONER KING.

This is an action on a promissory note brought by Ada, Marie and Bessie Cellers against E. L. Meachem and Joseph Lyons. The note was executed December 27, 1904, and runs "90 days after date, without grace, we promise to pay," etc., and is signed by Meachem and by Lyons, with the word "surety" added to the name of the latter. The complaint is in the usual form. Meachem having failed to appear, default was entered against him. Lyons answered, admitting the execution of the note, and, for an affirmative defense, pleaded that he signed the instrument as a surety only, without consideration, and for the sole use and benefit of Meachem and of the plaintiffs; that the payees had full knowledge of the conditions under which it was executed; that, after the note had matured, plaintiffs, in consideration of additional security given them by Meachem, and without the knowledge or consent of Lyons, extended the time of payment: and that by reason thereof he was relieved from all liability. At the trial evidence was admitted, over plaintiffs' objections and exceptions, tending to show an agreement extending the time as alleged. At the close of the trial, their counsel requested the court to direct a verdict in favor of their clients for the sum demanded, there being no dispute as to the amount due, which request was denied. The court, at defendant's request, instructed the jury, among other things, that if they found plaintiffs, after maturity of the note, entered into an agreement with Meachem extending the time of its payment, without the consent of Lyons, no recovery could be had against him. Exceptions were taken to this part of the charge, and also to the refusal of the court to direct a verdict for plaintiffs. The jury returned a verdict for defendant, and, from a judgment thereon, plaintiffs appeal.

REVERSED.

For appellants there was a brief over the name of *Fullerton & Orcutt*, with an oral argument by *Mr. Albert Newton Orcutt*.

For respondent there was a brief over the name of *Coshow & Rice*, with an oral argument by *Mr. Oliver Perry Coshow*.

Opinion by MR. COMMISSIONER KING.

Several errors are assigned, but the only one necessary for determination is whether or not the alleged agreement between plaintiffs and Meachem, extending the time of payment of the note, relieved Lyons from liability thereon. There is no conflict in the testimony on the issues involved, but counsel for appellants contend that the answer and the proof were insufficient to establish a valid agreement extending the time of payment. Under the conclusion reached, it will be unnecessary to consider the question of the sufficiency of the pleadings or the evidence on this point. It will be assumed, for the purposes of this opinion, that the alleged agreement was sufficient, under the law as recognized by the decisions of this court prior to the adoption of the Negotiable Instruments Act of 1899. Pursuant to this theory, if that act makes no change in the prior law, no judgment could be rendered against Lyons upon the facts admitted; but, if such act did change the rule in this respect, then the court erred, as claimed by plaintiffs. The Negotiable Instruments Act became a law May 17, 1899, and is entitled: "An act relating to negotiable instruments—being an act to establish a law uniform with the laws of other states on that subject": Laws 1899, pp. 18, 44 (B. & C. Comp. §§ 4403-4594). It will be observed that the note sued upon was executed after the act took effect. The question, therefore, to be considered, is whether or not this act changed the rule previously recognized in this state. The effect of the statute upon the relation of the parties depends upon whether Lyons was primarily liable on the note. If his liability was secondary, the right to recover against him would be dependent upon the proving of the agreement as alleged: B. & C. Comp. § 4522.

Prior to May 17, 1899, a valid agreement entered into between a principal and the payee of a negotiable instrument.

binding the latter, without the assent of the surety, whereby the time of its payment was extended, relieved the accommodation maker, whether his liability was primary or secondary, and the existence of such agreement could be shown by parol: *Findley v. Hill*, 8 Or. 247, 249 (34 Am. Rep. 578); *Brown v. Rathburn*, 10 Or. 158; *Hughes v. Pratt*, 37 Or. 45 (60 Pac. 707); *Hoffman v. Habighorst*, 38 Or. 261 (63 Pac. 610; 53 L. R. A. 908).

1. The word "surety," appended to the name of a maker of a note, cannot alter his liability as to the owner thereof, and only shows that, as between the promisors, one is a principal and the other a guarantor: *Bowen v. Clarke*, 25 Or. 592 (37 Pac. 74); *Hoffman v. Habighorst*, 38 Or. 261 (53 L. R. A. 908; 63 Pac. 619); *Galloway v. Bartholomew*, 44 Or. 75 (74 Pac. 467). Since the word "surety" can only affect the status of the makers of the note as between themselves, and as Lyons' liability to the plaintiffs is the same as if he had signed the instrument without using the qualifying word after his name, he became, in the language of the negotiable instruments act, "absolutely required to pay the same," and is therefore primarily liable: B. & C. Comp. § 4592; *Hughes v. Ladd*, 42 Or. 123 (69 Pac. 548); *Galloway v. Bartholomew*, 44 Or. 75 (74 Pac. 467); *National Citizens' Bank v. Topfritz*, 178 N. Y. 466 (71 N. E. 1); same case, 81 App. Div. 593 (81 N. Y. Supp. 422).

2. The fact that Lyons executed the note solely for the benefit of Meachem, and plaintiffs were aware of these conditions, is of no avail, for a person cannot enter into a contract, even though solely for the benefit of another, and then shield himself from responsibility on the theory that the purchaser has knowledge that his acts are without actual consideration: B. & C. Comp. § 4431; *Packard v. Windholz*, 88 App. Div. 365 (84 N. Y. Supp. 666).

3. The negotiable instruments law defines what constitutes an accommodation maker, and specifies how negotiable instruments may be discharged; the sections thereon being as follows:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to

some other person. Such person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party": B. & C. Comp. § 4431.

"A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after the maturity in his own right": B. & C. Comp. § 4521.

"A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved": B. & C. Comp. § 4522.

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same": B. & C. Comp. § 4592.

These sections, as quoted, with the exception of the clause "unless made with the assent of the party secondarily liable" (Section 4522), are identical with the language used in the New York act on the subject: 2 Rev. St. N. Y. (Birds-eye Ed.) 1901, pp. 2466, 2472, 2484, §§ 3, 55, 200, 201. After the adoption of this act in that state, the same questions raised here were urged there, in the case of *National Citizens' Bank v. Toplitz*, 178 N. Y. 466 (71 N. E. 1), but the Court of Appeals, finding the cause must be reversed on the ground that a sufficient consideration for the extension of the time of payment had not been alleged, declined to pass on the effect of the new act, though, when the case was theretofore considered by the Appellate Division of the Supreme Court (81 App. Div. 593: 81 N. Y.

Supp. 422), it was determined that under the new law an accommodation maker was primarily liable, notwithstanding any knowledge the holder of the instrument might have had as to his relationship with the principal. While this act has been adopted in practically the same form in other states, its effect upon the law prevailing prior to its enactment does not appear to have been passed upon by the courts; but the authors of a very recent work, in discussing the New York statute, after pointing out that it only provides for the discharge of a person secondarily liable, that a person is primarily liable who by the terms of the instrument is absolutely required to pay it, and that all others are secondarily liable, make the following observation: "It would seem to follow that the statute has disposed of the conflict of authority upon this question by holding the accommodation acceptor or maker to his apparent engagement as a principal debtor, and making him liable notwithstanding an indulgence given to the indorser or drawer for whose benefit he became a party to the instrument": Eaton & Gilbert, Com. Paper, § 123f.

What is expressed in an act is deemed exclusive, when it is creative, or in derogation of some existing law, or of some of the provisions of a particular act: 2 Sutherland, Stat. Const. (Lewis' 2 ed.), § 491. It is indicated in the title of the act under consideration that its purpose is "to establish a law uniform with the laws of other states on that subject." Inasmuch as the enactments relating to negotiable instruments differed in the various states, and as the decisions interpreting both the common-law and legislative provisions were far from being harmonious, it must be inferred, from the language constituting the title of the act, that it was intended to provide a complete and comprehensive law on this subject; and since it defines an accommodation maker, making him primarily liable, and in one section designates how negotiable instruments may be discharged, but contains no provision whereby a person primarily liable can be released, except by payment, etc., and in the section following specifies the manner in which persons secondarily liable may

be relieved of responsibility on such instrument, it follows that the immunities indicated there were intended to exclude all exceptions not contained therein, under the familiar maxim: "*Expressio unius est exclusio alterius.*" It is, therefore, clear, under the well-settled rules governing the construction of statutes, that when this act, which, in effect, declares that all persons signing a negotiable instrument shall be liable, whether executed for a valuable consideration or as an accommodation maker, and then specifies the particular manner in which negotiable instruments may be discharged, designating, as an exception thereto, that, when the liability is secondary, it may be avoided by any valid agreement extending the time of payment, etc., without such person's consent, was passed, it was the intention of the legislative assembly to make such provisions exclusive of all others. We are of the opinion that the Negotiable Instruments Act substitutes its provisions for the former law, as recognized by this court prior to 1899.

It follows that plaintiffs were entitled to the instruction asked, and the court erred in charging the jury to the effect that the agreement for the extension of the time of payment of the note, if proved as alleged, would preclude a recovery against Lyons. The judgment appealed from should, accordingly, be reversed, and the cause remanded for proceedings not inconsistent with this opinion.

REVERSED.

Argued 13 February, decided 26 March, 1907.

BAINES v. COOS BAY NAVIGATION CO.

89 Pac. 371.

VALIDITY OF COMPROMISE AGREEMENT—CONSIDERATION FOR NOTE.

1. Under the general rule that voluntary compromise settlements of disputed claims will be sustained where they are made with mutual knowledge of the facts, and in good faith to avoid litigation, a court will not inquire into the validity of a lien to avoid the foreclosure of which the president and general manager of the corporation against which it was filed gave the corporate note. The note being for less than the sum claimed, and the lien having been released, there was a sufficient consideration.

APPEAL—SUBSEQUENT APPEALS—LAW OF CASE.

2. Where the testimony on an issue is substantially the same as that given at a former trial, the conclusion reached in regard to it on such former trial is the law of the case.

EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—SELF SERVING DECLARATIONS.

3. In an action on notes of a corporation, entries in the company's book of bills payable as to the notes, which were made after the notes were executed, and by a person who did not appear as a witness, were not admissible to affect their validity if the payee had no knowledge of the entries and had not assented to them, although alluded to in testimony taken at a former trial and read by plaintiff.

TRIAL—UNANSWERED QUESTION—STATEMENT OF EXPECTED ANSWER.

4. Where the form of a question to which objection is made does not disclose the answer expected, and no statement on that point is made by counsel, the action of the court in sustaining such objection is not reviewable, since no error appears in the record.

INSTRUCTIONS—REQUESTS—GENERAL CHARGE.

5. Refusal to give requested instructions is not error where the law applicable to the facts involved is given fully in the general charge.

From Coos: JAMES W. HAMILTON, Judge.

Action by W. E. Baines (W. U. Douglas, administrator, substituted) against the Coos Bay, Roseburg & Eastern Railroad & Navigation Co. and others. Judgment for plaintiff, and defendant railroad and navigation company appeals.

AFFIRMED.

For appellant there was a brief over the names of *Coke & Seabrook* and *Williams, Wood & Linthicum*, with an oral argument by *Mr. John Couch Flanders*.

For respondent there was a brief with oral arguments by *Mr. Edward Byers Watson* and *Mr. Thomas Sumner Minot*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is an appeal by the defendant the Coos Bay, Roseburg & Eastern Railroad & Navigation Co., a corporation, from a judgment rendered against it and one R. A. Graham in favor of W. E. Baines for \$11,432.33, the amount of two promissory notes, and the further sum of \$1,000 as attorney's fees. After the appeal was perfected, Baines died, and W. U. Douglas, the administrator of the decedent's estate in Oregon, was, by order of court, substituted as plaintiff. The facts involved are detailed in a former opinion of this court: *Baines v. Coos Bay Nav. Co.* 41 Or. 135 (68 Pac. 397).

1. It is contended by appellant's counsel that an error was

committed in denying their request for a directed verdict in favor of their client, based on the grounds that the testimony introduced at the trial failed to show that any consideration existed for the giving of the notes sued upon, or that the defendant Graham was authorized to execute such instruments on behalf of the railroad company. Considering these legal principles in the order in which they are stated, the bill of exceptions shows that Baines, on April 3, 1894, to secure the payment of \$12,750, which sum he claimed to be due him for labor performed for the corporation, filed against its property a lien, and was about to begin a suit for the foreclosure thereof, to prevent which Graham, the general manager of the company and the legal owner of all its capital stock, except six shares that had been delivered to the several directors of the corporation to hold in trust for him, compromised the claim, April 18, 1894, by executing to Baines, on its behalf, two promissory notes of \$1,000 each, payable in 12 and 18 months, respectively, and guaranteed the payment thereof. It is argued that the pretended lien contained a lumping demand, including items for which the statute imposes no charge on specific property, and, this being so, no consideration existed for the making of the notes. A copy of the lien notice mentioned was offered in evidence, but whether or not it is subject to the objection now insisted upon is not deemed necessary to a decision herein, for the claim evidently represented what Baines and Graham believed to be a valid demand against the corporation, and could be enforced by a suit instituted for that purpose.

The law, in order to promote the peace of society, encourages the voluntary settlement of claims that are doubtful, when made in good faith, with a full disclosure of all the facts, and with reasonable grounds of belief that the validity of the demand could be sustained in an action or a suit instituted for that purpose, and such adjustment, when consummated by the parties, will not be disturbed for ordinary mistakes of law or fact, though the agreement may not have been what a court would have adjudged, if the matter had been regularly submitted to and

decided by it: 8 Cyc. 505; *Wells v. Neff*, 14 Or. 66 (12 Pac. 84, 88); *Smith v. Farra*, 21 Or. 395 (28 Pac. 241; 20 L. R. A. 115); *Sing On v. Brown*, 44 Or. 11 (74 Pac. 207). The compromise adverted to afforded a sufficient consideration for the giving of the notes in settlement of the claim that was filed as a lien.

2. The implied right of Graham to execute on behalf of the corporation promissory notes in settling urgent demands against it has heretofore been considered in giving an instruction to find for the defendant on the ground that the evidence as to his authority was insufficient to submit the cause to the jury (*Baines v. Coos Bay Nav. Co.* 45 Or. 307; 77 Pac. 400), and as the testimony admitted at the trial herein, on this branch of the inquiry, is substantially the same as that given at the former hearing, the conclusion there reached has become the law of the case: *Thompson v. Hawley*, 16 Or. 251 (19 Pac. 84); *Aplegate v. Dowell*, 17 Or. 299 (20 Pac. 429); *Kane v. Rippey*, 22 Or. 296 (23 Pac. 180); *Portland Trust Co. v. Coulter*, 23 Or. 131 (31 Pac. 280); *Stager v. Troy Laundry Co.* 41 Or. 141 (68 Pac. 405).

3. F. A. Laise, a bookkeeper, testified, as a witness for the corporation, that he was employed by it and had in his possession its book of bills payable, showing what promissory notes had been issued by it, whereupon pages 1 and 2 thereof were offered in evidence. An objection thereto having been made on the ground that the writing referred to was irrelevant and immaterial, the defendants' counsel stated that the pages mentioned related to the notes specified in the complaint, and also to two drafts of \$2,000 each, which, considered in connection with Baines' testimony respecting a promissory note for \$2,715.02, executed to him by Graham, disclosed the manner in which the corporation treated such commercial paper. Baines' counsel further objected on the ground that the evidence offered was incompetent, and that no testimony had been introduced tending to show that their client had any knowledge of the entries mentioned or that he had assented thereto, which objection having

been sustained, an exception was reserved. The evidence so offered is not specified in the bill of exceptions with such particularity as to enable us to identify the pages with certainty, but we understand them to be indicated as "Defendants' Exhibit H," which relates to the settlement of the alleged lien, shows the execution of the notes set out in the complaint, and the drawing of two bills of exchange on the First National Bank of Roseburg in favor of Baines for \$2,000 each, payable in four and six months, respectively, which latter drafts he testified were given him in payment of an account against Graham individually. The exhibit offered contains entries which purport to have been made in May, 1894, to the effect that the notes specified, which are dated April 18 of that year, were not negotiable, should not be hypothecated, and would become void if the bonds of the corporation were not sold in a year; that the bills of exchange were to be paid; states that the settlement of Baines' claim of \$12,000 extinguished a note of \$2,715.02 and a voucher for \$553.03, and also contains the following memorandum: "Originally \$11,888.20, Jany. 27, 1892." The object sought to be accomplished by the introduction in evidence of the pages mentioned was to show, if possible, that Baines' alleged lien was a demand against Graham only, which, without any authority therefor from the corporation, he settled by giving what purported to be its negotiable paper. The bookkeeper who identified the corporation's book of bills payable did not enter the statements adverted to, and as they purport to have been made after the execution of the notes sued upon, if the validity of the commercial paper was thus attempted to be impaired, Baines would not be affected thereby, unless he had knowledge of the entries and assented thereto, which fact is denied in the objection interposed, in sustaining which no error was committed.

4. The bookkeeper, referring to other books of the corporation, further testified that, though the entries noted therein were primarily railroad accounts, they contained memoranda of the business transacted by Graham and also by the Beaver Hill

Coal Co., a corporation, stating that such records disclosed that the cash accounts of the parties named had been commingled. He was then directed by defendant's counsel as follows:

"You may state from those books what payments appear there to have been made on the notes in question, Mr. Laise."

To which he replied:

"On cashbook, folio 67, there appears an entry of July 17, 1895, Check No. 638 was paid to Mr. Baines, amount \$500, to apply on twelve months' note of \$4,000.

Q. From the entry in this cashbook or from the books of account, as they were then, is there any way a bookkeeper can ascertain whose funds made that payment?"

An objection to the question, on the ground that it was irrelevant and incompetent, having been sustained, an exception was allowed, and it is contended by defendants' counsel that an error was thus committed. No statement appears in the bill of exceptions as to what answer was reasonably expected from the witness in response to the question asked. If the bookkeeper could have testified that it was Graham's money which was used to make the payment on Baines' note, it was incumbent on defendants' counsel to make a statement to that effect to the court, because the form of the question does not disclose the answer which might be expected: *State v. Savage*, 36 Or. 191, 209 (60 Pac. 610, 61 Pac. 1128). If, however, Laise could not have said, from an inspection of the books, whose money was used for the purpose indicated, and it was desired by such means to contradict any testimony that had been given by Baines as to the party making the payment which had been indorsed on one of his notes, a statement to that effect was also necessary for the reason specified, if it be assumed that such negative testimony could be used to controvert the positive declaration of a witness. In the absence of a statement of the testimony reasonably to be expected from the witness in answer to the question asked, no error was committed as alleged.

Baines' counsel, without objection, read to the jury the testimony of F. J. De Neveu, given at a former trial of this cause,

from which it appeared that Exhibit H, hereinbefore considered, was in the handwriting of one J. B. Hassett, and, though alluded to by the witness, all reference thereto was omitted from his testimony. The defendants' counsel thereupon offered the exhibit in evidence, stating that it tended to support the allegations of the answer and showed the dealings between Baines and Graham, but, the exhibit having been excluded, an exception was allowed, and it is claimed that the action of the court in this respect was erroneous. Though the exhibit constituted a part of the evidence read to the jury, it was evidently not made at the time Baines' notes were executed, nor by any person who appeared as a witness so he could have explained the memoranda, and as the writing may have been subsequently prepared to defeat a recovery on the notes, and it did not appear that Baines had knowledge thereof or assented thereto at any time, we do not think any error was committed in excluding such evidence.

An exception was saved to the court's refusal to give the following instruction:

"If you find the consideration of the execution of the notes in question was the cancellation of the mechanic's lien which plaintiff had filed on the railroad of the defendant, your verdict must be for the defendant, as the lien so filed by plaintiff was invalid, and was not a charge or incumbrance upon the property of the defendant."

It is maintained by appellant's counsel that an error was committed in this respect. What has heretofore been said in relation to the consideration of the notes sued upon is decisive of the question here presented, for, though the alleged lien may have been invalid, if a full disclosure of all the facts involved was made and the parties honestly believed that the claim could have been sustained in a suit to foreclose the lien, the settlement reached cannot be disturbed, and, as the instruction requested did not contain any of these conditions, no error was committed in refusing to give it.

5. Exceptions were taken by defendants' counsel to the court's refusal to give two other instructions which they requested, but,

as the general charge fully explained to the jury the law applicable to the facts involved, we think no error was committed as alleged.

It follows from these considerations that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Argued 31 January, decided 26 March, rehearing denied 23 July, 1907.

WARNER v. De ARMOND.

89 Pac. 373, 90 Pac. 1113.

ABATEMENT—DEFECT OF PARTIES.

1. Where an action against several persons alleged to be partners is for a tort, it is no ground for abatement of the action that one of the defendants is not a member of the firm, or that one of the members of the firm is not made a defendant.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

2. A nonsuit on the ground of contributory negligence in an action for injury to an employee in a sawmill while replacing a belt on a moving pulley by the catching of his clothing on bolts projecting from the sides of the pulley so far as to be liable to catch one's clothing, is properly refused where there was evidence that pulleys were usually constructed so that the bolts did not thus project, that it was customary and proper in this class of sawmills to replace belts on revolving pulleys of such character, that there was no particular danger in doing so if the pulley were properly constructed, that the employee had no knowledge of the defect, and that in putting on the belt he was discharging the duties usually required and expected of an employee in his situation.

PERSONAL INJURIES—EVIDENCE AS TO EXISTENCE AND NUMBER OF PLAINTIFF'S FAMILY NOT HARMLESS.*

3. In a personal injury case evidence that plaintiff had a family, consisting of a wife and children, is irrelevant and improper, and the error is not rendered harmless by the statement of the court, on overruling an objection to the evidence, that plaintiff could not recover anything by reason of his having a family, but that the evidence was competent, as showing the conditions which might affect his mental feelings, nothing further in the way of instructions or otherwise having been done in regard to the evidence.

MASTER AND SERVANT—LIABILITY FOR USING INFERIOR MACHINERY.

4. In an action for injuries to an employee in a mill, caused by the catching of his clothing on bolts projecting from a revolving pulley, it is competent to show that such pulleys are commonly used in mills of that class, an employer using machinery in common use not being liable for an accident which might have been prevented by the use of different machinery, in the absence of a statute providing the kind and character of machinery to be used or regulating the use thereof.

*NOTE.—To the same effect is *Maynard v. Oregon Railroad Co.* 46 Or. 15.

From Josephine: HIERO K. HANNA, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action against E. C. De Armond, R. L. De Armond, Hugh De Armond, and C. E. McClane, alleged to be partners, doing business under the firm name and style of E. C. De Armond & Sons, to recover damages for a personal injury. The complaint, after alleging the partnership of defendants, averred that on or prior to May 4, 1904, they were the owners of a sawmill, and shortly prior to such date employed the plaintiff to perform labor and services as a millwright in repairing the carriage therein; that at the time of the employment defendants represented to plaintiff that the mill was otherwise in complete repair and good running order, in consequence of which he made no inspection of the other machinery or fittings; that after the work on the carriage had been completed plaintiff remained in defendants' employ at their request to assist generally in starting the mill and making such additional alterations or repairs as might be necessary; that after the mill had been started and while plaintiff was so employed, it became and was his duty to replace a belt on a pulley running at a speed of from 1,200 to 1,400 revolutions per minute, and while so engaged, and without any fault or negligence on his part, his clothing became entangled on certain bolts projecting from such pulley, whereby his left arm was torn from the body at the elbow joint; that such pulley was made of wood and was fastened together with bolts running through from side to side; that in constructing the same the defendants negligently and carelessly caused and permitted such bolts to project a distance of two or three inches, which projections could not be observed while the pulley was revolving at the usual rate of speed, and was highly dangerous to persons working about such pulley or employed in replacing a belt thereon in the manner required in the operation of the mill; that plaintiff had no notice or knowledge of the manner in which the pulley was constructed or the danger of such projecting bolts; that defendants had full knowledge of the condition of such pulley, but failed and neglected to warn plaintiff

thereof. The defendants answered by way of abatement that C. E. McClane was not a member of the firm of E. C. De Armond & Sons, but that Mary McClane was such partner. A demurrer to this plea was sustained and the defendants E. C. De Armond, R. L. De Armond, and Hugh De Armond answered jointly, denying the negligence charged in the complaint and setting up as a defense contributory negligence on the part of the plaintiff. The defendant C. E. McClane denied that he was a partner in the firm of E. C. De Armond & Sons, or in any way liable for the injury to plaintiff. Upon the issues thus joined the cause was tried to a jury, resulting in a verdict and judgment in favor of plaintiff and against E. C. De Armond, R. L. De Armond and Hugh De Armond, and they have appealed.

REVERSED.

For appellants there was a brief with oral arguments by *Mr. W. C. Hale* and *Mr. Robert Glenn Smith*.

For respondent there was a brief and an oral argument by *Mr. H. D. Norton*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. There was no error in sustaining the demurrer to the plea in abatement. This is an action for tort, and in such cases partners are liable jointly and severally. The injured party may, at his election, proceed against all or such a number of the partners as he may choose, and it is no defense that other partners are not joined, or that persons not partners have been made defendants: *Burdick, Partnership* (2 ed.), 266; *Story, Partnership*, § 167; *Pomeroy, Code Rem.* (4 ed.), § 208; *Roberts v. Johnson*, 58 N. Y. 613; *Mode v. Penland*, 93 N. C. 292.

2. It is claimed that the court erred in overruling a motion for nonsuit based on the contention that it appears from the complaint and the evidence that it was such contributory negligence in the plaintiff to attempt to replace the belt while the pulley was in motion as will preclude a recovery. The evidence tended to show that defendants were preparing to start their mill for the season's work and employed the plaintiff, who is an

experienced millwright, to do some repairing in and about the mill carriage, and temporarily to assist generally in getting the mill in running order and to work until permanent places should be assigned to the various employees. After the repairs for which he was employed were completed, the mill was started, and plaintiff assisted by direction of the defendants in operating the edger, cut-off saw, removing slabs and the like, and "worked around generally," but was not assigned to any particular work. While he was so employed the belt which furnished the power for the cut-off saw slipped from the pulley, and he attempted to put it on, which he "could have done very easy" if the pulley had been a smooth one. His clothing caught on the projecting bolts, and his arm was drawn under the belt and torn from the body. The pulley was what is known as a wooden split pulley, each half being made of three pieces of wood nailed or otherwise fastened together, and having fastened thereon a wooden shoulder through which run bolts to clamp the halves together and hold the pulley on the shaft. The bolts were not countersunk, but the ends were allowed to project such a distance from the shoulder that clothing or any like substance coming in contact with them while the pulley was revolving was liable to be caught and wound around the shaft. When the pulley was in operation these bolts were not visible, and plaintiff had no knowledge of their existence, nor had he been warned of the dangerous or defective condition of the pulley. The plaintiff testified that it was not usual in constructing such pulleys to leave the ends of the bolts so projecting, that it was customary and proper in mills of that character to replace belts on revolving pulleys of the kind and character referred to, and that there was no particular danger in doing so if the pulley was properly constructed. There was, therefore, evidence tending to show that the pulley in question was negligently constructed and operated by defendants, that plaintiff had no knowledge or information of its defective condition, that at the time of his injury he was in the discharge of the duties usually required and expected of an employe in his situation, and that he

did not act heedlessly or recklessly in attempting to replace the belt. Much of this evidence is contradicted and disputed by the defendants, but its weight was for the jury, and there was no error in overruling the motion for a nonsuit.

3. Upon the trial the plaintiff was allowed to testify, over defendants' objection, that he had a family consisting of a wife and four children, the eldest of whom was 12 years of age and the youngest 2. This evidence had no legitimate bearing upon the issue to be tried, was calculated to arouse the sympathy of the jury and unduly increase the damages, and was, therefore, irrelevant and incompetent. The damages for a personal injury must be only such as the plaintiff himself has sustained and in law is not dependent in the slightest upon his domestic relations or the size of his family: *Pennsylvania Co. v. Roy*, 102 U. S. 451 (26 L. ed. 141); *Louisville & N. Ry. Co. v. Binion*, 107 Ala. 645 (18 South. 75); *Pittsburg, etc., Ry. Co. v. Powers*, 74 Ill. 341; *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. 620; *Stephens v. Hannibal & St. Jo. Ry. Co.* 96 Mo. 207 (9 S. W. 589; 9 Am. St. Rep. 336). In ruling upon the objection to the testimony, the court said that it did not think plaintiff "could recover anything by reason of his having a family, that is, having a wife and family, he could recover nothing in their behalf," but the evidence was competent as showing the conditions surrounding the plaintiff which might affect his mental feelings. No further allusion seems to have been made to this testimony. It was not withdrawn from the consideration of the jury, nor were they instructed to disregard it in estimating the damages, if any, to which plaintiff was entitled, and we do not think this court can say that the error in its admission was harmless, nor that it did not affect the amount of the recovery.

For its admission, the judgment of the court below must be reversed, and a new trial ordered.

REVERSED.

Decided 23 July, 1907.

ON MOTION FOR REHEARING.

PER CURIAM. In view of another trial, appellant has filed a petition asking the court to pass upon the sufficiency of the complaint and certain alleged errors based upon the rejection of testimony and the refusal to give requested instructions.

The objection that the complaint does not state facts sufficient to constitute a cause of action, because it shows on its face that the accident to the plaintiff was caused by his contributory negligence, is disposed of by what is said in the opinion on the motion for a nonsuit, and need not further be elaborated.

4. Testimony that the pulley which caused the injury to the plaintiff was such as is commonly and ordinarily used in saw-mills of the character operated by defendants was competent. An employer who uses machinery which is in common use in the line of business in which he is engaged is not liable for an accident caused thereby to an employe, which might have been prevented by the use of different machinery, in the absence of a statute providing the kind and character of machinery to be used or regulating the use thereof: *Duntley v. Inman*, 42 Or. 334 (70 Pac. 529; 59 L. R. A. 785); *Hoffman v. American Foundry Co.* 18 Wash. 287 (51 Pac. 385).

The material parts of the instructions refused were, it seems to us, embodied in the charge as given.

REVERSED: REHEARING DENIED.

Argued 16 January, decided 19 March, 1907.

MULTNOMAH COUNTY v. WILLAMETTE TOWING CO.

89 Pac. 389.

PLEADING—PURPOSE OF MAKING MORE DEFINITE.

1. B. & C. Comp. § 86, authorizing the court to require a pleading so indefinite that the precise nature of the charge or defense is not apparent to be amended, only applies to a pleading containing a defective or vague statement of a good cause of action or defense, and to defects on the face of the pleading, and not to matters omitted which the opposite party desires inserted in order to demur to them.

APPEAL AFTER SECOND TRIAL—REVIEWING FIRST TRIAL.

2. Where a new trial is awarded, errors committed on the first trial will not be considered on appeal from the second trial.

DUTY OF COURT IN DETERMINING MOTION FOR NEW TRIAL.

3. The trial judge should grant a new trial, if in his opinion the evidence is insufficient in law or fact to support the verdict, or the verdict is unjust.

APPEAL—REVIEW—ORDER FOR NEW TRIAL.

4. The granting of a new trial is an interlocutory order involving the merits, and is reviewable on an appeal from the judgment on the new trial.

REVIEWING ORDER GRANTING NEW TRIAL—DISCRETION OF LOWER COURT.

5. Granting a new trial is within the sound discretion of the court, and will not be disturbed on appeal, where there is a substantial conflict in the testimony on essential facts.

BILL OF EXCEPTIONS—ATTACHING EVIDENCE BY REFERENCE.

6. Where the bill of exceptions does not include within itself any part of the evidence in the case, but contains a statement that the testimony and certain documents designated as exhibits are annexed to and made a part of the bill, and for the purpose of identification are locked in several trunks and delivered to the clerk of the court with instructions to transmit them to the clerk of the appellate court, neither the evidence nor the exhibits being physically attached to the bill, or certified or identified by the trial judge, such evidence and exhibits are not properly in the record, and should not be considered.

TORTS—SHIPPING—JOINT AND SEVERAL LIABILITY.

7. If an injury to a bridge by a passing vessel is caused by negligence in undertaking the voyage under the circumstances, and that negligence was the proximate cause of the injury, all persons controlling or participating in the voyage will be jointly and severally liable; but if the injury was due to negligent navigation after the voyage was begun, those concerned in the navigation will be alone liable.

SHIPPING—CHARTER—LIABILITY FOR MANAGEMENT OF VESSEL.

8. A charter party which leaves the vessel in charge of a master employed by the owners, who are to furnish a full complement of men, provide provisions, pay expenses (except fuel, port charges, expenses of loading and the like), is not a demise of the vessel, but a freighting contract, and the charterer is not liable for the acts of the officers and crew in the management of the vessel.

APPEAL—WEIGHT OF CONFLICTING EVIDENCE—NEW TRIAL.

9. A consideration of the evidence satisfies the court that the weight of the testimony in this case was not so clearly in plaintiff's favor as to justify the conclusion that the trial court erred in granting defendants a new trial.

NEGLECT—PROOFS PERMISSIBLE UNDER GENERAL DENIALS.

10. In actions for damages caused by negligence, though caused by a vessel, defendants can show under a general denial that the acts causing the injury were done by persons for whose negligence they were not liable, this being a denial of a merely evidentiary matter and not of the cause of action. This right based on the denials is not affected by the fact that affirmative defenses stating the negligence of such other persons were rejected by the court on motions and demurrers.

PLEADING—RULE AS TO PROOF UNDER GENERAL DENIALS.

11. Any fact which in effect admits the cause of action, but attempts to avoid its force and effect, must be affirmatively pleaded; but evidence which controverts facts necessary to be proved by plaintiff may be shown under a general denial.

CHANGING VENUE—DISCRETION—REVIEW.

12. The right to grant a change of venue rests in the sound discretion of the trial court, and its decision will not be disturbed, unless there is a clear abuse of discretion.

JURY—COMPETENCY OF TAXPAYER IN ACTION AGAINST HIS COUNTY.

13. In an action by or against a county for damages, a taxpayer thereof may be challenged by either party for implied bias.

STIPULATIONS—EFFECT—CHALLENGE OF JURORS.

14. An oral stipulation in open court to select the jury from the jury list, and waive right to challenge for implied bias, does not relate to future trials.

EVIDENCE COMPETENT TO EXPLAIN OPPONENT'S TESTIMONY.

15. In an action against the charterer of a vessel to recover for injuries to a bridge, where defendant denied responsibility for the navigation of the vessel, evidence to show how one of defendant's employees happened to be on board at the time is competent.

RES GESTAE—EXPLANATORY EVIDENCE.

16. In an action to recover for injury to a bridge by a vessel passing through under its own steam, but assisted for steering purposes by a tugboat, the defense by the tugboat company being that the injury was caused by interference with the navigation of the vessel by her captain, without consulting the pilot, testimony as to what the captain of the vessel said at the time or immediately after giving the order is competent as a part of the *res gestae*.

COMPETENCY OF OPINION EVIDENCE—CASE UNDER CONSIDERATION.

17. In an action to recover damages from a towing company for negligently towing a vessel against a bridge instead of through its draw opening, a witness who had many times passed through that bridge on vessels under tow, had watched their navigation, and was familiar with the circumstances of the accident in question, having been on the deck of the vessel when she struck the bridge, is competent to express an opinion as to how the mishap occurred and what caused it, this being a case where a witness combines a statement of what he saw with a statement of his deduction therefrom, which is sometimes permissible.

OPINION WITNESS—DUTY TO DETERMINE QUALIFICATION—DISCRETION.

18. The qualification of a witness to express an opinion is a question of fact for the trial judge, whose finding will not be disturbed, except for abuse of discretion.

WITNESS—PROPRIETY AND SCOPE OF CROSS-EXAMINATION.

19. It is not proper cross-examination to ask a witness concerning matters stated in a pleading that he had never seen and was not bound by, and about which he had not been asked in chief.

COMPETENCY OF CONTRADICTORY EVIDENCE.

20. It is competent for a party to an action to state what he did in reference to the occurrence in question and when he did it, as presenting his version of the case in opposition to the version of the other side.

In an action against a lumber company to recover for injury to a bridge by a passing vessel chartered by defendants, plaintiff charged defendants with participation in the negligent navigation of the vessel. Held, that testimony by defendants' manager that the officers of the company had nothing to do with the navigation of the vessel, and that his

orders to the master to take his vessel to a dock beyond the bridge were not given on the day the attempt was made, was competent.

TRIAL—ORDER OF RECEIVING EVIDENCE—DISCRETION.

21. In the trial of a case a large discretion must rest with the judge as to the order of receiving proof and the examination of witnesses, and a refusal to permit a plaintiff to read to the jury a paper identified by defendant on cross-examination will not be reviewed, as plaintiff was not entitled—except by permission—to offer further evidence after closing its case.

ARBITRATION AND AWARD—AWARD AS EVIDENCE—PARTICULAR ISSUES—DIFFERENT PARTIES.

22. In an action to recover for injury to a bridge by a passing vessel in which the owners of the vessel were not parties, an award by arbitrators in a controversy between the owners and defendant lumber company, the charterer, is not admissible in evidence; the parties being different, and the matter of the award not being the same as that of the action.

TRIAL—DIRECTING VERDICT ON CONFLICTING EVIDENCE.

23. A trial judge acts clearly within his discretion in refusing to direct a verdict where the evidence is conflicting as to the actual occurrences and the credibility of witnesses.

From Clackamas: THOMAS A. MCBRIDE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action to recover damages caused by the steamship Almond Branch fouling the Morrison Street Bridge. The Almond Branch is an English ship of 3,461 tons register, and was in Portland under charter to the Pacific Export Lumber Co. On February 19, 1901, she had taken part of a cargo of lumber at a dock south of Morrison Street, and her captain was directed by the charterer to drop down to the North Pacific Lumber Co.'s dock to receive the remainder. To do so it was necessary to pass through the draws of both the Madison and the Morrison Street Bridges. The river at the time was 14 feet above low water, and there was a current of about three miles an hour. The captain requested the lumber company to secure two tow-boats to assist in taking the vessel through the harbor, but the steamer Vulcan, of which the defendant Mitchell was captain, belonging to the Willamette & Columbia River Towing Co., was the only one available, and with her lashed to the port side aft of the Almond Branch to assist in steering, the voyage was begun with the defendant Emken as pilot. The vessels passed safely through the draw of the Madison Street Bridge, but, while

backing through the draw at Morrison Street, the Almond Branch fouled the bridge and injured it to such an extent that the plaintiff county was compelled to and did pay out \$5,682.82 for necessary repairs. This action is brought by the county, the owner of the bridge, against the towing company, William Mitchell, captain of the Vulcan, Harry Emken, the pilot, and the Pacific Export Lumber Co., the charterer of the Almond Branch, to recover treble the amount of such damages, under Section 4044, B. & C. Comp.

The complaint alleges that the defendant towing company as a towing company, the defendant Emken as pilot, and defendant Mitchell as captain of the towboat Vulcan, took control of the Almond Branch and negligently, carelessly and recklessly attempted to tow and navigate her from a point south of the Morrison Street Bridge to a point north thereof with only one small towboat, the Vulcan, lashed opposite her stern; that the Vulcan was too small, and did not have power sufficient safely to handle the Almond Branch, and was carelessly and negligently lashed to the stern, instead of opposite the bow; that the defendants navigated the Vulcan and the Almond Branch in such a reckless, careless and negligent manner that such vessels crashed into the Morrison Street Bridge with great force, injuring and damaging the bridge as stated; that it was gross negligence to attempt to make the voyage at the time with only one towboat, and especially careless to lash such boat to the stern of the Almond Branch; that after the voyage was begun the defendants had great difficulty in getting the vessels in position to pass through the draw of the Morrison Street Bridge, and were compelled to and did use the steam power of the Almond Branch in connection with that of the Vulcan to navigate such vessels up stream to get them in position to pass through, and could have, without difficulty, discontinued the voyage, but they negligently and recklessly proceeded in their hazardous and negligent employment of attempting to tow the Almond Branch through the draw with only one towboat; that ordinary care and prudence required the power of two steamers, one lashed to the

stern, and one to the bow of the Almond Branch, in addition to her own steam, to counteract the effect of the current and safely and prudently to navigate her through the bridge; that the defendants were guilty of gross negligence in failing to take such precaution; that the Pacific Export Lumber Co. employed the other defendants to do the acts set forth, with knowledge that such acts were dangerous and liable to injure the bridge.

The towing company and William Mitchell, answering jointly, denied all the acts of negligence charged in the complaint, and affirmatively alleged, in substance, that the Morrison Street Bridge was an unlawful obstruction to navigation, and while the Almond Branch was being backed down through the draw under her own steam, which was the ordinary and prudent course to pursue, her master gave an order to her engineer to go full speed ahead, thereby causing the vessel to swing around and strike the bridge. To this answer a demurrer was sustained, and defendants filed an amended answer, alleging substantially the same facts, to which a demurrer was likewise sustained. They thereupon filed a second amended answer, denying all the material allegations of the complaint, and affirmatively setting forth: (1) The act of the legislature authorizing the construction of the Morrison Street Bridge; the location of such bridge with reference to the other bridges in the harbor; that the bridge was not constructed and maintained so as not injuriously to impede and obstruct the free navigation of the river, as required by the law authorizing its construction; and that such bridge was and is a hindrance and impediment to navigation. (2) That the Almond Branch was a vessel lawfully navigating the waters of the Willamette River, under the control and in the possession of her master, who was appointed and paid by the owners; that the owners of the vessel, through their agent, applied to the defendant towing company for the use of the steamboat Vulcan for the purpose of facilitating the steering of the steamship through the drawbridges in the harbor, the Vulcan and her crew to be under the control of the master and pilot of the Almond Branch and subject to their orders; that the towing company

thereupon furnished the Vulcan, a powerful towboat, in good condition and order and properly equipped and manned for the purpose and use stated; that such boat was made fast to the steamship Almond Branch by the direction of her master, and the vessels proceeded down stream stern foremost, as was prudent and the usual manner of navigating under such circumstances, the Almond Branch being under her own steam, and both vessels under the control and charge of the master and pilot of the Almond Branch, whose orders were given from the navigating bridge; that such vessels proceeded safely through the draw of the Madison Street Bridge, but in passing through the draw of the Morrison Street Bridge, without any fault or negligence on the part of the answering defendants, or the Vulcan, or any of her officers or crew, and while the Vulcan was under the control and direction of the master of the Almond Branch and obeying all orders given from the bridge thereof, the Almond Branch came into collision with the Morrison Street Bridge, damaging the same to an extent unknown to the defendants, but the Vulcan herself did no damage to the bridge, and no act or omission of the Vulcan, her officers or crew, contributed to the collision. (3) That the river was at the time more than 10 feet above low water, and Morrison Street Bridge is so constructed that, when the water is above the stage mentioned, the current is changeable, and it is impossible for reasonably skillful and prudent sailors and navigators to foresee a change in the direction of the current through the drawbridge in advance of the arrival of the vessel; that due precaution had been taken by the master and pilot of the Almond Branch for her navigation through the draw, and any damage sustained by the plaintiff was caused solely by reason of an unexpected and sudden change in the current which could not reasonably have been anticipated by prudent navigators and pilots, and such accident occurred wholly without the fault of any of the defendant's officers. A demurrer was sustained to that portion of the answer setting up that the Morrison Street Bridge was an unlawful obstruction to navigation, and a motion was interposed to make the remainder

of the answer more definite or to strike out such answer as frivolous, immaterial and irrelevant. This motion was overruled, and plaintiff replied.

The defendants the lumber company and Emken each answered separately, denying and alleging substantially the same matters and facts as set up in the original answer of the towing company and Mitchell. Demurrers were sustained to these answers, and amended answers filed. The lumber company, by its amended answer, denied the negligence charged in the complaint; denied that it hired or employed any of the parties in charge of the Almond Branch or the Vulcan at the time of the accident, or in any way controlled or directed their conduct, or was responsible for their acts; and affirmatively alleged: (1) That it was merely the charterer of the Almond Branch and had no control over her navigation, and that it did not employ the Vulcan or any of its co-defendants to tow or pilot the vessel or assist in any manner in her navigation, and did not attempt to control any of them in or about the matters and things alleged in the complaint. (2) That the Morrison Street Bridge is not constructed or maintained in accordance with the act of the legislature authorizing its construction, and is an unlawful hindrance and obstruction to navigation, and that the accident complained of occurred solely on account of the faulty construction of the bridge. (3) That by reason of the delay of the Almond Branch, due to its collision with the Morrison Street Bridge, on account of the faulty and improper construction of such bridge, the defendants and charterers of the vessel were damaged in the sum of \$2,793.58, for which it demands judgment against the plaintiff. A demurrer was sustained to that part of the answer setting up that the Morrison Street Bridge was an unlawful obstruction to navigation and to the alleged counterclaim. A reply was filed to the remainder of the answer. Emken, by his amended answer, denied the several acts of negligence charged in the complaint, denied that he undertook to or did act as pilot of the Almond Branch on the voyage referred to and mentioned in the complaint, or that he steered or managed such vessel.

Upon the issues thus made, the cause was tried before Judge Sears and a jury in Multnomah County, and resulted in a verdict in favor of the plaintiff. On motion of the defendants, the verdict was set aside, and a new trial granted for insufficiency of evidence to justify the verdict. The place of trial was thereupon changed to Clackamas County, on motion of the defendants, because of alleged prejudice against them in Multnomah County, and the cause was again tried in Clackamas County before Judge McBride and a jury, resulting in a verdict in favor of the defendants. Judgment was rendered on the verdict, and plaintiff appeals, assigning numerous errors which will be referred to in the opinion so far as deemed important.

AFFIRMED.

For appellant there was a brief with an oral argument by *Mr. Ralph Rolofson Dunaway*.

For respondents there was a brief over the names of *Williams, Wood & Linthicum, John Couch Flanders and Cake & Cake*, with oral arguments by *Mr. Flanders and Mr. William Marion Cake*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It is claimed that it was error to deny plaintiff's motion to make the second amended answer of the defendants towing company and William Mitchell more definite and certain. The motion sets out at length the averments which counsel desires inserted in the pleading and which he says in his brief are "the vital portions of the two former answers, which had been purposely cut out of the second amended answer by the defendants, to try to keep said second amended answer from being demurrable." Where the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made more definite by amendment (Section 86, B. & C. Comp.); but this remedy is only applicable when the pleading contains a defective or vague statement of a good cause of action or defense, and is designed to cure such defects as appear upon the

face of the pleading itself. It is not the province of the court on such a motion to require the pleader to state the evidence upon which he relies or amend his pleading for the purpose of enabling his adversary to demur: 6 Enc. Pl. & Pr. 275; *Johnson v. Wilcox Sewing Machine Co.* (C. C.) 25 Fed. 373. The motion here was not directed against vague or uncertain allegations of a pleading, but was to require the defendants to insert therein new and independent allegations prepared and framed by their adversary, and we know of no rule of law authorizing or sanctioning such a practice.

2. There were many questions argued at the hearing based on alleged errors committed during the trial in Multnomah County; but, as the verdict was set aside and a new trial awarded, such questions are immaterial on this appeal. The order granting the new trial left the case as though no trial had taken place (*Edwards v. Edwards*, 22 Ill. 121; *Hollenbeck v. City of Marshalltown*, 62 Iowa, 21: 17 N. W. 155), and rulings affecting the previous trial become of no consequence.

3. But, it is contended that it was error to set aside the verdict and grant a new trial. The verdict was set aside, and the new trial granted, under Section 174, B. & C. Comp., for insufficiency of the evidence to justify the verdict. It is not only the right but the duty of a trial court, in passing on applications of this kind, to weigh the entire case, and, if in its opinion the verdict is against the clear weight of the testimony, to grant a new trial. The trial judge listens to the evidence, sees the witnesses, notes their appearance on the witness stand, is familiar with the atmosphere surrounding the case, and therefore has an opportunity to ascertain the merits of the controversy and duly to appreciate the weight and force of every item of evidence, and if, in his judgment, the evidence is insufficient, in point of law or fact, to support the verdict, or the verdict is manifestly unjust and such as reasonable men would not adopt or return, he ought not to hesitate to set it aside and grant a new trial. This question was so thoroughly considered in *Serles v. Serles*, 35 Or. 289 (57 Pac. 634), that it is sufficient merely to refer to that case.

4. The granting of the new trial was an interlocutory order, involving the merits, and is reviewable on this appeal.

5. An application for that purpose, however, is addressed to the sound discretion of the trial court, and its ruling will not be disturbed by an appellate tribunal, when there appears to have been a substantial conflict in the testimony upon the essential facts: 14 Enc. Pl. & Pr. 962; *McCrum v. Corby*, 15 Kan. 112. In the very nature of things, the judge who presides at the trial has a better opportunity to form a just estimate of the credibility of witnesses, and the weight to be given their testimony, than an appellate court, which sees only so much of the case as can be reduced to writing. Great reliance must therefore be placed upon his judgment, and, when he approves a verdict and decides that there was sufficient evidence to support it, his decision will rarely be disturbed. Indeed, the records of this court show that such decision almost invariably ends the controversy; and when the trial judge fails to approve the findings of the jury, and orders a new trial for insufficiency of the evidence, this court must, for the same reason, generally, accept that as the proper and logical conclusion.

6. In this case no part of the evidence as given on the trial is embodied in the bill of exceptions. It contains simply a statement of the rendition of the verdict, a copy of the motion for a new trial, a recital that such motion was allowed, and the opinion of the trial judge, without any evidence whatever. It is true there is a statement in the bill that certain documentary evidence designated as exhibits and all the oral testimony as reported and transcribed by the official stenographer are annexed to and made a part of the bill of exceptions, and for the purpose of identification are "put in a tin box and locked in, and key and box and papers delivered to the clerk of the court, with instructions to transmit the same to clerk of supreme court, and all said exhibits included in said box are hereby annexed to said bill of exceptions and made a part thereof." In fact, however, none of such evidence or exhibits are in any way embodied in, physically attached to, or made a part of, the bill of exceptions, or certified

or identified by the trial judge. They are, strictly speaking, no part of the record: *State v. Clements*, 15 Or. 237 (14 Pac. 410); *Nosler v. Coos Bay Nav. Co.* 40 Or. 305 (63 Pac. 1050).

7. But, waiving this point (although this must not be regarded as a precedent), and looking into what counsel claims to be the testimony, we find the evidence conflicting, but in our opinion preponderating in favor of the defendants. The complaint charges, in substance, that it was negligence for the defendants to attempt to move the Almond Branch through the harbor of Portland at the then stage of the water with only one towboat, and that they were negligent in the management of the vessel after the voyage was commenced, and such negligence was the proximate cause of the injury to plaintiff's bridge. If the voyage was negligent, or such as reasonably prudent men, familiar with river navigation, would not have undertaken, and such negligence was the proximate cause of the injury complained of, then all persons controlling or participating in such voyage would be jointly and severally liable, and it would be no defense for one joint tort-feasor that another person was also liable. If, however, the voyage was not negligent, and the accident to the bridge was caused by negligence in the navigation after the voyage was begun, the party or parties so negligent would alone be liable.

8. There was no evidence, so far as we can ascertain, connecting the lumber company with any of the negligent acts charged. It was the charterer or hirer of the Almond Branch, but did not have command, possession or control of the vessel, so far as its management or navigation were concerned, except to direct where it should receive its cargo. The vessel was under the sole charge and command of the master employed by and who represented the owners, and not the charterers. By the terms of the charter party, the owners agreed to let, and the lumber company to hire, the vessel "with a full complement of officers, seamen, engineers and firemen, and in every way fitted for the service to trade" between such ports as the charterer might direct for a period of from three to nine calendar months at the char-

terer's option; the cargo to be taken or discharged at any dock or wharf the charterer might direct where the vessel could lie safely afloat. The owners agreed to provide and pay for all provisions, the wages of the captain, officers and crew, insurance, engine room stores, and to maintain the vessel in a thoroughly effective state in hull and machinery for service, and that the captain employed by the owner should be under the orders and direction of the charterers as regarded agency and other arrangements, and should prosecute his voyages with the utmost dispatch. The charterer was to provide and pay for fuel, port charges, expenses of loading, and the like, and 10 shillings per gross ton register per calendar month. Such a charter party is a mere contract of affreightment, and not a demise of the vessel, and the charterer is not liable for the acts and conduct of the officers and crew in the management of the vessel: *Grimberg v. Columbia Packers' Assoc.* 47 Or. 257 (83 Pac. 194; 114 Am. St. Rep. 927).

9. The witnesses differ as to whether it was want of ordinary prudence to attempt to take a vessel of the size of the Almond Branch through the draw of the Morrison Street Bridge, at the then stage of the water, with only one towboat. Capt. Spencer and one or two other witnesses for the plaintiff say that it was not safe to do so. Capts. Pease, Bailey, Snow and Conway say that there is a difference of opinion among river-men on the subject, some pilots using one towboat, and some two. Capts. Emken, Patterson and Pope testify that in their opinion one towboat was sufficient, and that an ordinarily prudent pilot would attempt the voyage with but one boat. It thus appears that there was a conflict in the testimony upon the question as to whether the voyage itself was negligent, but the evidence was not so clearly in plaintiff's favor that the conclusion of the trial court on the motion for a new trial will be disturbed; and, if the voyage was not negligent, there was no evidence of any negligence of the towing company or of Capt. Mitchell contributing to the injury complained of.

10. The Vulcan, of which Mitchell was captain, and which

belonged to the towing company, was not furnishing the power for or towing the Almond Branch at the time of the accident, but was lashed to her for steering purposes only. The Almond Branch was proceeding under her own steam, but as she was a propellor, and could not steer herself while backing, the Vulcan was lashed to her by direction of those in charge for that purpose. The Vulcan and her captain were under orders from the bridge of the Almond Branch, and there is no evidence that such orders were not strictly obeyed, or that any act of omission or commission of the Vulcan or her captain in any way contributed to the injury to plaintiff's bridge, unless it was in participating in a negligent voyage. The defendant Emken was the pilot of the Almond Branch, and the testimony of himself and the witness Lewis, who was on the vessel, was to the effect that, while she was passing through the draw, her master, who was in command, without direction from the pilot, and without his knowledge, gave an order to the engine room to go full speed ahead, without communicating that fact to the Vulcan, which was backing, the result of which was to cause the Almond Branch to swing to port and foul the bridge. This testimony is undisputed, and it is but a fair inference from it that the proximate cause of the injury was the act of the master referred to, and not the negligence of any of the defendants to the present action. Upon such a record the court was clearly justified in setting aside the verdict and granting a new trial.

Counsel argues, however, that evidence of the negligence of the master was not competent under the pleadings, and cites authorities which seem to hold that in collision cases the defendant cannot rely on a general denial, but must set up by way of answer the circumstances relating to the collision: *The Why Not*, L. R. 2 Adm. & Ecc. 265; *The Washington Irving*, Abb. Adm. 336 (Fed. Cas. No. 17,243). But the cases referred to were in admiralty, and, whatever the proper rule may be in such proceedings, it can have no application here. This is an ordinary action for negligence, and in such case it is competent, under a general denial, for the defendant to show that the acts

upon which it is based were done by other persons for whose negligence it was not liable: 14 Enc. Pl. & Pr. 344; Bradner, Evidence (2 ed.), 46. Thus, in an action to recover for an injury to plaintiff's house, caused by negligent blasting, the defendant was permitted to show under general denial that the blasting was done by an independent contractor over whom he had no control: *Roemer v. Striker*, 142 N. Y. 134 (36 N. E. 808).

11. The rule is that any fact which in effect admits the cause of action set out in the complaint, but attempts to avoid its force and effect, must be affirmatively pleaded; but evidence which merely controverts facts necessary to be proved by the plaintiff to authorize a recovery must be shown under the denials: *Buchtel v. Evans*, 21 Or. 309 (26 Pac. 67); *Duff v. Willamette Steel Works*, 45 Or. 479 (78 Pac. 363; 17 Am. Neg. Rep. 121). The averment that the injury to plaintiff's bridge was due to the negligence of defendants was put in issue by the answer, and they were therefore entitled to show affirmatively under their denials that they exercised due care, and that the injury arose from some other cause, such as the act of some person for whom they were not responsible: *Hunter v. Grande Ronde Lum. Co.* 39 Or. 448 (65 Pac. 598). Nor were they deprived of this right because the answers as filed set up other reasons for the accident. The complaint and answers made an issue upon the question of negligence. The burden of proof was upon the plaintiff to show the negligence charged, either directly or by inference, and any testimony which would tend to controvert the plaintiff's case was competent under the denials. Nor was the question concluded by the ruling of the trial court sustaining the demurrer to a former answer, which set up that the master of the Almond Branch was responsible for the accident. That fact was alleged among other matters and the demurrer may have been, and probably was, sustained on the ground that the matter pleaded, so far as material, would be competent evidence under a general denial. We are therefore of the opinion that the ruling of the court below granting a new trial should not be disturbed on this appeal.

12. After the verdict had been set aside and the new trial granted, defendants moved for a change of venue, supporting their motion by affidavit to the effect that the inhabitants of Multnomah County, from the taxpayers of which a jury to try the case must be drawn, were so prejudiced against the defendants by reason of their financial interests as taxpayers that a fair and impartial trial could not be had in the county, and because any taxpayer would, when called as a juror, be subject to challenge for implied bias by either party to the litigation. The motion was allowed, and the place of trial changed to Clackamas County, and this ruling is assigned as error. The right to change the place of trial of an action rests in the sound discretion of the trial court, and its ruling in granting or refusing an application for that purpose will not be disturbed on appeal, unless there is a clear abuse of discretion (*State v. Humphreys*, 43 Or. 44, 55: 70 Pac. 824; *State v. Armstrong*, 43 Or. 207: 73 Pac. 1022), and there was no such abuse in this case.

13. Under the law a taxpayer of Multnomah County could have been successfully challenged for implied bias by either of the litigants (*Ford v. Umatilla County*, 15 Or. 313: 16 Pac. 33), and thus it would have been difficult, if not impossible, to secure a jury in that county.

14. The plaintiff contends, however, that the defendants were estopped from insisting on a change of the place of trial on account of the financial interest of the jurors because of an agreement made before the first trial to waive the right of challenge on that account. It appears that, before the first trial, the presiding judge notified counsel that, unless they could agree upon some satisfactory plan to limit the challenges to jurors for implied bias because they were taxpayers, he would, on his own motion, change the place of trial. In order to avoid such change, counsel orally stipulated in open court that they would select the jury from the then jury list of the county, and would waive the right to challenge any of the jurors so selected for implied bias. This agreement, however, evidently related to

the trial then about to take place, and was not intended to apply to future trials.

There are 36 assignments of error, based upon rulings made during the progress of the trial in Clackamas County. Many of these present the same question in different forms, and others have already been disposed of. We shall not attempt to notice the several assignments in detail, but will briefly consider the general questions involved.

15. Mr. Wheelwright's testimony as to how Mr. Lewis happened to be on board the Almond Branch at the time of the accident was competent. The plaintiff charged and attempted to show that the Pacific Export Lumber Co., of which Wheelwright was the manager, was a party to and participated in the alleged negligent navigation. Lewis was an employe of the lumber company and superintended the outside work of loading vessels. His being on the Almond Branch, if unexplained, might raise an inference that the lumber company was in some way participating in or directing the navigation of the vessel, and Wheelwright's testimony that he was not there as a representative of the company, but for his own convenience, would tend to repel such inference.

16. The testimony of Capt. Emken as to what the master of the Almond Branch said at the time or immediately after giving the order to the engineer to go full speed ahead was competent as part of the *res gestae*, characterizing and explaining his act.

17. The testimony of Lewis that from his experience in the harbor of Portland, and knowledge of the river currents, and what he saw from the bridge of the Almond Branch, the vessels were proceeding safely through the draw at the time the alleged order of the master was given to go full speed ahead, and without such order the vessels would not have collided with the bridge, was, we think, competent. Lewis had been "on the water all his life," had passed through the draw 20 or 30 times on board vessels at all stages of the water, had watched their navigation, and was familiar with the facts in the present case, and therefore competent to testify, from what he saw from the bridge

of the Almond Branch and from his general knowledge of the river and navigation, whether the vessels were passing safely through the draw at the time alluded to. His testimony was not wholly that of an expert nor opinion evidence. It was based in part upon what he saw at the time, much of which it would be difficult correctly to state or detail so as to be fully understood by the jury: *First Nat. Bank v. Fire Association*, 33 Or. 172 (53 Pac. 8).

18. His qualification to express an opinion on the subject was a question of fact for the trial judge, and his finding will not be disturbed except in case of an abuse of discretion: *Oregon Pottery Co. v. Kern*, 30 Or. 328 (47 Pac. 917); *First Nat. Bank v. Fire Association*, 33 Or. 172 (53 Pac. 8); *Farmers' Nat. Bank v. Woodell*, 38 Or. 294, 300 (61 Pac. 837); *Aldrich v. Columbia Ry. Co.* 39 Or. 263 (64 Pac. 455).

19. There was no error in sustaining an objection to the question asked Lewis on cross-examination concerning the averments in the amended answer of the defendant lumber company. Lewis was not an officer of the company. The answer was not prepared by him or under his direction. It was not verified by him, nor was he in any way responsible for its contents; and furthermore, he was not interrogated about the matter on his direct examination.

20. The testimony of Wheelwright, the manager of the lumber company, that the officers of the company had nothing to do with the navigation of the Almond Branch, and his orders to the master to take his vessel from a dock south of the Morrison Street Bridge to one north thereof were not given on the day the attempt was made to move the vessel, was clearly competent. The plaintiff charged the lumber company with participation in the negligent navigation of the vessel, and this evidence was competent as tending to disprove such charge.

21. While Wheelwright was on the stand, he was asked on cross-examination, if he verified the first answer of the lumber company, and, his reply being in the affirmative, an offer was made to read to the jury the statement of the cause of the

accident as contained in such answer. The objection was sustained, we think properly, on the ground that the plaintiff had closed its case, and, if the reading of the answer was competent at all, it was evidence in chief and should have been offered at the proper time.

22. There was no error in refusing to admit in evidence, by way of rebuttal, an award made by arbitrators in England of a controversy between the owners of the Almond Branch and the defendant lumber company, and the confirmation of such award by the Court of King's Bench. The parties to the submission are not the parties to this action, nor did the matter of the award cover the subject now in controversy. The question there in dispute was whether the Almond Branch was off hire, within the meaning of the charter party, during the time she was afoul the bridge and aground in the river, and an adjudication of this question could have no bearing upon the present action.

23. At the close of the testimony, the plaintiff moved for a directed verdict, and the overruling of this motion is assigned as error. This motion was based on the contention that defendants had not overcome the *prima facie* case made by plaintiff; but that was a question of fact for the jury, and not the court. There was abundant evidence tending to show that defendants were not responsible for the accident to plaintiff's bridge. The credibility of the witnesses, the effect of contradictory and inconsistent statements, and the weight to be given to their testimony, were not questions which could be disposed of on motion for a directed verdict.

The remaining assignments of error need not be specially noticed. In our opinion they are without merit. All the essential features of the requested and refused instructions were embodied in the general charge, and the case was fairly and fully submitted to the jury. The instructions, as given, cover every essential feature of the case with commendable clearness.

From a careful examination of the entire record, we are satisfied that there was no error, and that the judgment must be affirmed.

AFFIRMED.

Argued 5 March, decided 2 April, 1907.

SCOTT v. CHRISTENSON.

89 Pac. 376.

PLEADINGS—AIDED BY VERDICT.

1. The imperfect allegation or recital in a complaint that two dollars was paid January 2, 1899, in the allegation that nothing had been paid on the note sued on, "except * * the sum of \$2 paid on account thereof, Jan. 2, 1899," is cured by a general verdict for plaintiff, the issues joined requiring proof thereof.

NOTES—LIMITATIONS—EFFECT OF PART PAYMENT.

2. A payment on a joint obligation by one of the obligors or his agent or legal representative revives it against all who were liable thereon, though made without even their knowledge.

NOTES—COMPETENCY OF EVIDENCE OF PAYMENT.

3. In an action against several makers of a note, the testimony that one of the makers paid to the witness, who was authorized to receive it, a stated sum at a stated time, is competent, though the witness is not certain which maker made the payment.

NOTES—LIMITATIONS—INDORSEMENT OF PART PAYMENT.

4. An indorsement on a note, purporting to acknowledge receipt of money, is admissible in evidence in favor of the party making it, to repel the presumption of the bar of limitations, on his testifying that one of the joint makers paid the money to him to be credited on the note.

PRODUCTION OF LETTER—PRESUMPTION AS TO RULING OF TRIAL COURT.

5. The bill of exceptions as to the admission of secondary evidence of the contents of a letter, demand for production of which was made on defendant at the trial, being silent on the subject, it will be presumed that the evidence disclosed that defendants had sufficient time for production of the letter.

From Marion: **GEORGE H. BURNETT**, Judge.

Action by Charles Scott, executor of R. H. Scott, deceased, against M. Christenson and another. Judgment for plaintiff, and defendants appeal. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. Frank Holmes*.

For respondent there was a brief with oral arguments by *Mr. Charles William Corby* and *Mr. Henry Johnson Bigger*.

MR. JUSTICE MOORE delivered the opinion of the court.

This action was commenced in September, 1904, by Charles Scott, as executor of the last will and testament of R. H. Scott, deceased, to recover the remainder alleged to be due from de-

defendants on their promissory note given to the testator. The complaint alleges the execution of the instrument, the making of a last will by the testator, his death, the probate of the will, the plaintiff's nomination, appointment and qualification as executor, his right to the note, and also avers:

"That defendants have not paid said note, nor any part thereof, except the sum of \$20.50, as interest thereon, paid on January 19, A. D. 1897, and the sum of \$2, paid on account thereof, on the 2d day of January, A. D. 1899, and there is now due and owing thereon (less the above-mentioned credits), the sum of \$74, with interest thereon at the rate of 8 per cent per annum from the 20th day of April, A. D. 1893."

The answer denied the allegations of the complaint, except the execution of the note and the plaintiff's representative capacity, and alleged a complete discharge of the instrument, and that no payments had been made thereon by the defendants or either of them since August 20, 1896, by reason whereof the action is barred by the statute of limitations. The reply put in issue the allegations of new matter in the answer, and, a trial being had, judgment was rendered against the defendants as demanded in the complaint, and they appeal.

1. It is contended by defendants' counsel that, as it appears from the face of the plaintiff's primary pleading that the statute of limitations had fully run since the maturity of the note sued upon, it was incumbent upon him to allege in positive terms a payment within six years prior to September, 1904, but, not having done so, the complaint fails to state facts sufficient to constitute a cause of action. No demurrer to the complaint was interposed, in the absence of which every reasonable inference deducible from the pleadings will be invoked in favor of a general verdict, which, though it will not supply the omission of a material averment, cures a defective statement, if the issue joined necessarily required proof of the facts imperfectly alleged: *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Savage v. Savage*, 36 Or. 268 (59 Pac. 461); *Ferguson v. Reiger*, 43 Or. 505 (73 Pac. 1040). It will be remembered that the complaint states that the defendants had not paid the note or any part thereof,

"except * * the sum of \$2, paid on account thereof, on the 2d day of January, A. D. 1899." The quoted words indicate a payment within six years prior to the commencement of the action, and if the declaration be considered in the nature of a recital instead of a positive averment, if the fact alleged was established in the manner pointed out in a former appeal of this cause, the statement is sufficient, in our opinion: *Scott v. Christenson*, 46 Or. 417 (80 Pac. 731).

2. The plaintiff, as a witness in his own behalf, after refreshing his memory by referring to the indorsements made on the note in question, was directed to state what payments had thus been made, and, over objection and exceptions, stated, *inter alia*, that on January 2, 1899, one of the defendants, whom he thought to be H. Christenson, but was not sure, paid him at Woodburn \$2 to be credited on the note. The defendants' counsel thereupon moved to strike out such testimony on the ground that, as there were two joint makers of the note, it was incumbent on plaintiff, in order to prevent the statute of limitations from running against an action on the note, definitely to prove which one of the defendants made the alleged payment, but, the motion having been denied, an exception was saved. The rule is settled in this state that a payment of a part of a joint obligation by a maker thereof or by his agent or legal representative revives it as against all persons who were liable thereon, though made without their knowledge or consent: *Partlow v. Singer*, 2 Or. 307; *Sutherlin v. Roberts*, 4 Or. 378; *Dundee Invest. Co. v. Horner*, 30 Or. 558 (48 Pac. 175); *Smith's Estate*, 43 Or. 595 (73 Pac. 336, 75 Pac. 133); *Sheak v. Wilbur*, 48 Or. 376 (86 Pac. 375).

3. It was stated by counsel for the parties at the trial in this court that the defendants herein are brothers. The bill of exceptions does not disclose whether or not there exists any similarity of countenance, bearing or manner between the defendants, but by reason of their intimate relation it is possible that the plaintiff could not recognize one from the other, yet he may have been able to distinguish them from all other persons. If

such is the case, his testimony was competent for their identification, and a payment by either to be indorsed on the note at his request was sufficient to extend the statute of limitations, which had not run when the alleged payment was made. As the consanguinity of the defendants may have produced a similarity in their appearance, and such resemblance is not negatived in the bill of exceptions, the plaintiff's testimony was sufficient to entitle the matter to be submitted to the jury.

4. The payment of \$2, at the time and in the manner stated, having been testified to by plaintiff as indicated, the promissory note, and the indorsement of that sum thereon, were, over objection and exception, received in evidence, and it is insisted by defendants' counsel that an error was thereby committed. An indorsement purporting to acknowledge the receipt of money or the value of property, made on a promissory note by the holder thereof, without the knowledge of the maker, is not admissible in evidence in favor of the party making the indorsement so as to repel the presumption of payment arising from the lapse of years: *Roseboom v. Billington*, 17 Johns. 182; *Whitney v. Bigelow*, 4 Pick. 109. When, however, a payment is indorsed on a note by the holder at the request of the payor, proof of such fact is sufficient to remove the bar of the statute of limitations (*Sibley v. Phelps*, 6 Cush. 172), and the note and the indorsement are thereupon admissible in evidence, on the theory that, if the jury believe the payment was made and indorsed in the manner indicated, such memoranda enable them to determine the amount due on the commercial paper. The plaintiff having testified that the payment of \$2 was made January 2, 1899, by one of the defendants, to be credited on the note, no error was committed in admitting it and the indorsement in evidence.

5. The plaintiff, during the progress of his case in chief, served upon the defendants, in open court, a notice to produce a letter purporting to have been written by him to them, identifying it by its date, the place from which it was sent, and to which it was addressed, and upon their failure to comply therewith he testified that on February 7, 1898, he mailed from

Woodburn, Oregon, the letter called for in a postage-prepaid envelope, addressed to the defendants at Silverton, Oregon, which envelope had printed thereon a request to return it to the plaintiff, at the city from which it was sent, if it was not delivered in 10 days, and that the letter was never returned to him. Thereupon a letterpress copy of the epistle mentioned was, over objection and exception, admitted in evidence. It is contended by defendants' counsel that his clients did not have sufficient time in which to produce the letter called for, and, this being so, an error was committed in admitting secondary evidence thereof. A party is entitled to a reasonable time to comply with a request to produce documents which are sought by his adversary to be offered in evidence. What is proper time, however, depends upon the ability of the party to bring forward the exhibit desired. If it appears that the paper is in his possession or is easy of access, a demand therefor, made at the trial, is sufficient: *Griffin v. Sheffield*, 38 Miss. 359 (77 Am. Dec. 646); *Morrison v. Whiteside*, 17 Md. 452 (79 Am. Dec. 661). The bill of exceptions is silent upon this question, and, as it does not purport to contain all the testimony given at the trial, it must be presumed that the evidence disclosed that the defendants could have complied with the request, but, not having done so, no error was committed as alleged.

From these considerations it follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Decided 9 April, 1907.

Ex parte TURNER

89 Pac. 426.

FORGERY AS GROUND FOR DISBARMENT OF ATTORNEY.

An attorney who has forged applications to purchase state lands, has signed fictitious names to assignments of applications, and attached thereto false notarial certificates, is guilty of willful misconduct in his profession, and should be permanently disbarred, and his low estimate of professional integrity is further emphasized by a plea that he believed that the application and affidavits thereto were antiquated matters of form not binding on account of long disregard by school boards, and that he believed that he was doing the state a favor in assisting it to dispose of its lands.

This is a proceeding by the State of Oregon on the relation of a committee to disbar H. H. Turner. DISBARRED.

For the petition there was a written argument by *Mr. Frank Salisbury Grant*.

Contra, there was a written argument by *Mr. Carey Fuller Martin*.

PER CURIAM. This is a proceeding instituted upon the relation of the Grievance Committee of the State Bar Association, for the disbarment of H. H. Turner, an attorney of this court, for unprofessional conduct. The information charges that in August, 1902, Turner wrongfully and unlawfully forged a pretended assignment of a certificate for the sale of school lands by signing the name of G. I. Rice, a fictitious person, thereto, and attaching thereto a false certificate of acknowledgment of such assignment, purporting to have been taken before him as a notary public; that he also forged some 15 applications for the purchase of school lands by writing and signing the names of fictitious persons thereto, taking them to a notary public and inducing him to affix his official signature and seal thereto by falsely representing to and swearing before such notary that the persons whose names appeared on such applications had personally appeared before him (Turner); that by reason of these facts Turner has violated his duty as an attorney and shown himself to be a person not possessing the proper qualifications necessary to the further practice of the law.

Turner, by an answer, expressly admits the commission of the acts charged in the information, and by way of justification and excuse pleads, in substance, that prior to the commission of such acts he was employed by one Kelliher to take acknowledgments of numerous persons purchasing school lands through the agency of Kelliher; that while so employed he ascertained that the law for the sale of school lands was being repeatedly disregarded, and that such violations were sanctioned by the school land board, whereby he was induced to believe, and did believe, that the oath required by law of intending purchasers was not deemed ma-

terial or binding, but was treated as a mere matter of form; that all the desirable school lands had been sold, and the remaining lands were of less value than the price charged therefor; that the school land board was ready, willing and anxious to sell and dispose of the same; that, in consequence of these facts, he believed that in committing the acts charged against him he was doing a favor to the state in assisting it to dispose of its lands; that he had no idea that any of the certificates would be repudiated or their genuineness or *bona fides* questioned; that he had no intention to commit any crime or to defraud any person, and fully believed that the matter of the signature to applications for the purchase of school lands and the affidavits thereto were antiquated matters of style and form, and no longer valid or binding on account of long continued usage and disregard of their substance by the various school land boards.

It is unnecessary to comment upon such a defense. The essence of it is that Turner thought and believed that, because others were violating the law and committing crimes, he was justified in doing the same. A lawyer, who has no higher conception of personal integrity or professional honor, is an unworthy member of his profession and should be disbarred. An order to that effect will be entered.

DISBARRED.

Argued 14 March, decided 16 April, 1907.

RIDDLE v. ORDER OF PENDO.

89 Pac. 640.

FOREIGN CORPORATION—PROCESS—LOCAL SECRETARY AS AGENT.

A secretary of a local branch of a beneficiary society incorporated in another state, whose duty it is to forward to the principal office approved applications for membership, to receive, countersign and deliver certificates issued on such applications, to collect and forward assessments, to keep a list of the local members, to notify the principal secretary of suspensions, withdrawals and deaths, and to communicate information from the supreme officers to the local members, is an "agent" of such foreign beneficiary society on whom summons may be served under Section 55, B. & C. Comp., relating to service of process on foreign corporations.

From Josephine: HIERO K. HANNA, Judge.

This is an action by George R. Riddle, as guardian of a minor, against the Order of Pendo, a private corporation of California. A motion to quash the service of summons having been sustained, plaintiff appeals. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

REVERSED.

For appellant there was a brief over the name of *Mr. H. D. Norton*.

For respondent there was a brief over the name of *Hough & Blanchard*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover upon a benefit certificate issued by the defendant to one Mary Simmons for \$1,225, payable in the event of her death to Mathew Casey Riddle, and the only question for decision is whether jurisdiction was obtained of the defendant by service of summons in this state upon the secretary of the local or subordinate lodge or council of which the deceased was a member. The defendant is a beneficiary society organized and incorporated under the laws of California, for the purpose, among other things, of providing for the payment of sick, accident and old age benefits to members, and for funeral and pension benefits to their beneficiaries. It is composed of a supreme council with its head office in California and local or subordinate councils in different parts of the country. The supreme council is composed of its officers, standing committees, past supreme councillors and representatives from certain designated representative districts, and is the supreme governing body of the order. The local or subordinate councils are composed of members residing in given localities, acting under a charter from the supreme council, and have among other officers a councillor and a secretary, who are chosen by ballot. Candidates for admission to the order, or to the benefits of the relief fund thereof, are required to make application to the local council on blanks prepared for that purpose, and if their appli-

cations are approved by such council, they are forwarded by the secretary thereof, together with the medical examination, to the officers of the supreme council, and if there approved, a benefit certificate is issued in favor of the applicant, which is returned to the secretary of the local council, where it is countersigned by the chief officer and the secretary, and by the latter delivered to the member.

The money with which to pay the benefit certificates and the obligations thereby incurred is raised from the members of the order by periodical assessments, which are required to be paid to and collected by the secretary of the local council and by him forwarded to the head office. The local secretary is the officer through whom all communications are had between the local council and its members and the supreme council and its officers. He is also required to keep an accurate list of members, notify the supreme secretary of all withdrawals, suspensions, expulsions and reinstatements, make out relief fund statements necessary for supreme court dues, conduct all correspondence with the supreme council relating to the several funds, forward to the supreme secretary all applications for membership and the accompanying papers, and when the relief fund certificate is received from the head office he is required to countersign and record it in an appropriate book and deliver it to the member.

The duties thus imposed upon the local secretaries constitute them agents of the corporation within the meaning of the statute, for the purpose of service of process. This was so ruled in *Hildebrand v. United Artisans*, 46 Or. 134 (114 Am. St. Rep. 852: 79 Pac. 347), in the case of a domestic corporation; and jurisdiction over foreign corporations, except in special instances, not material here, is obtained in this state in like manner as over domestic corporations: *Farrell v. Oregon Gold Co.* 31 Or. 463. The service in this case was, therefore, valid, and the court erred in sustaining the motion to quash.

Judgment reversed and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 21 March, decided 23 April, 1907.

Ex parte HOUGHTON.

9 L. R. A. (N. S.) 737: 89 Pac. 801.

CONSTITUTION—SCOPE OF PARDONING POWER.*

1. Under Const. Or. Art. V, § 14, providing that the governor shall have power to grant reprieves, commutations and pardons, after conviction, etc., subject to such regulations as may be provided by law, and Section 1572, B. & C. Comp., providing that reprieves, commutations and pardons may be granted by the Governor upon such conditions and with such restrictions as he may think proper, the Governor has authority to attach to a pardon any condition 'hat is legal, moral or possible of performance to be performed either before or after the pardon shall take effect, as, that the person so favored shall remain a law-abiding citizen.

PARDON—HOW BREACH OF CONDITION MAY BE DETERMINED.

2. Where a pardon provides by its terms that a stated official shall determine whether the conditions on which it was issued have been broken, the proviso becomes binding upon the acceptance of the favor, and the person pardoned is not entitled to a judicial determination of the claim of condition broken.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

On April 21, 1904, Charles V. Houghton was sentenced to the penitentiary for the term of five years for the crime of robbery. On March 15, 1906, the Governor commuted his sentence to expire on the 18th of the month, on the following condition:

"It is understood, however, between the executive and the said Chas. Houghton, and this commutation is delivered to and accepted by him upon this distinct agreement, that said Chas. Houghton is to be and remain a law-abiding citizen, and in case he violates any of the laws of the United States or of the state, or of any municipality in which he lives, the Governor of the state, whoever he may be, whenever he is satisfied, by such investigation as he may see fit to make, that said Chas. Houghton has violated his agreement or any of the conditions of this commutation, he may revoke the same without notice, and without the intervention of any court, by direction to any officer of the penitentiary or any sheriff of any county, cause the said Chas.

*NOTE.—In addition to the many annotated cases cited in the opinion, see monographic note on Conditional Pardons in 111 Am. St. Rep. 108-116, and *State v. Hunter*, with note, 104 Am. St. Rep. 361, 366. Read, also, note in 5 L. R. A. (N. S.) 1064, and *State v. Horne*, 7 L. R. A. (N. S.) 719.

Houghton to be arrested and returned to the penitentiary of the State of Oregon to serve the unexpired and unserved portion of his sentence, and this commutation is delivered with this distinct understanding and agreement."

The commutation was accepted by Houghton, and in pursuance thereof he was discharged from custody and remained at large until the 28th of December, 1906, when he was rearrested by the superintendent of the penitentiary by virtue of an order or warrant of the Governor, which, after stating the granting of the commutation and the condition thereof, proceeded:

"Whereas I have satisfied myself by investigation entirely satisfactory to me that said Charles Houghton has violated the terms of his agreement, in this: that he has been since his release convicted of the crime of larceny in Multnomah County, Oregon, and has been arrested for violating the ordinances of the City of Portland: Now, therefore, I do hereby revoke the said commutation and do order and direct that you arrest the said Charles Houghton and return him to the penitentiary of the State of Oregon, there to serve the unexpired portion of his sentence."

Houghton thereupon instituted proceedings in habeas corpus, claiming that his imprisonment is irregular and void on the following grounds: (1) That the Governor has no authority under the constitution or laws of this state to grant conditional commutations or pardons, and therefore the condition included in the commutation issued to the petitioner was void and the pardon absolute; (2) that, if the Governor has authority to grant conditional pardons or commutations, it is a judicial and not an executive question whether the prisoner has violated such conditions and thereby forfeited his liberty. The writ was denied, and the petitioner remanded to the custody of the superintendent of the penitentiary, and he appeals.

AFFIRMED.

For appellant there was a brief over the name of *Mac Mahon & McDevitt*, with an oral argument by *Mac Mahon*.

For respondent there was a brief over the names of *Andrew Murray Crawford*, Attorney General, and *I. H. Van Winkle*, with an oral argument by *Mr. Crawford*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The constitution provides that the Governor

"shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason, subject to such regulations as may be provided by law": Const. Or. Art. V, § 14.

There have been no regulations governing the exercise of the pardoning power provided by law, except the declaration in Section 1572, B. & C. Comp., that reprieves, commutations and pardons may be granted by the Governor upon such conditions and with such restrictions and limitations as he may think proper, which is but a restatement of the law as it exists without legislative action. It has everywhere been held, so far as we have been able to ascertain, that under a constitution like ours a pardon is a mere act of grace, and the pardoning power may attach to it any condition precedent or subsequent that is not illegal, immoral or impossible of performance; and, if the pardon is accepted by the prisoner, he will be bound to a compliance with the conditions imposed, and has no right to contend that the pardon is absolute: *Fuller v. State*, 122 Ala. 32 (26 South. 146: 45 L. R. A. 502: 82 Am. St. Rep. 1); *Ex parte Prout*, 12 Idaho, 494 (86 Pac. 275: 5 L. R. A., N. S., 1064); *Arthur v. Craig*, 48 Iowa, 264 (30 Am. Rep. 395); *People v. Marsh*, 125 Mich. 410 (84 N. W. 472: 51 L. R. A. 461: 84 Am. St. Rep. 584); *Ex parte Reno*, 66 Mo. 266 (27 Am. Rep. 337); *State v. McIntire*, 1 Jones' Law, 1 (59 Am. Dec. 566, note); *Lee v. Murphy*, 22 Grat. 789 (12 Am. Rep. 563); *Ex parte Wells*, 59 U. S. (18 How.) 307 (15 L. Ed. 421). A commutation is governed by the same rule: *People v. Burns*, 77 Hun, 92 (28 N. Y. Supp. 300); affirmed, 143 N. Y. 665 (39 N. E. 21); *In re Whalen*, 65 Hun, 619 (19 N. Y. Supp. 915).

Now, the conditions imposed by the Governor in this case were not illegal, immoral or impossible of performance, and to enforce them does not deprive the petitioner of any legal right. At the time the commutation was issued the petitioner was lawfully in prison, serving a sentence imposed by law for a crime

committed by him. The commutation was an act of grace or favor, and he was not obliged to accept it unless he so desired. He might have refused it, and served out his sentence as originally imposed, but chose to accept the conditional commutation, and in doing so stipulated that for a violation of the conditions he might be summarily arrested by order of the Governor and remanded to the penitentiary to serve the remainder of his original sentence. There is nothing unlawful or illegal in such an agreement, and no reason why it should not be enforced in the manner stipulated.

2. Some adjudications are cited as holding that a violation of a conditional pardon must be judicially determined, and that a convict cannot be rearrested or remanded to suffer his original sentence because of an alleged nonperformance of the conditions upon a mere order of the Governor: *Alvarez v. State*, 50 Fla. 24 (39 South. 481; 111 Am. St. Rep. 102); *State v. Wolfer*, 53 Minn. 135 (54 N. W. 1065; 19 L. R. A. 783; 39 Am. St. Rep. 582); *People v. Moore*, 62 Mich. 496 (29 N. W. 80). But in neither of the cases referred to did the pardon provide that it might be revoked and the convict rearrested and remanded on order of the pardoning power for a violation of the condition. In the *Alvarez Case*, it is expressly stated that such a stipulation would be valid and enforceable in the manner provided, and it was so intimated in the *Wolfer Case*. *People v. Moore*, 62 Mich. 496 (29 N. W. 80) involves merely the constitutionality of a statute authorizing an agent of the prison to arrest and remand without warrant a pardoned convict when it comes to the knowledge of such officer that he has violated the conditions of his pardon.

When a conditional pardon is issued and accepted which does not provide how it shall be determined whether the prisoner has violated the conditions imposed, the law seems to be that he is entitled to a hearing before some competent judicial tribunal before he can be remanded to serve his original sentence: 24 Am. & Eng. Enc. Law (2 ed.), 595. But, where the pardon provides upon its face that the Governor may summarily de-

termine whether the conditions have been complied with, and, if he finds that they have not, may revoke the pardon and order the reconfinement of the offender, such stipulation becomes binding upon the convict, and authorizes his rearrest and commitment upon the terms and in the manner imposed: 24 Am. & Eng. Enc. Law (2 ed.), 595. Thus, the Governor of Iowa pardoned a convict confined in the penitentiary on condition that he should during the remainder of the term of his sentence "refrain from the use of intoxicating liquors as a beverage," and should "use all proper exertion for the support of his mother and sister," and should not "be convicted of any offense against any of the criminal laws of the state." The pardon provided that, if he did not comply with the provisions imposed, he was to be "liable to summary arrest upon the warrant of the Governor of the state for the time being, whose judgment shall be conclusive as to the sufficiency of the proof of the violation of the" clause referring to drinking and support, "and to be confined in the penitentiary of the state for the remainder of the term of his sentence." The prisoner accepted the pardon, but violated its conditions. The Governor thereupon issued a warrant reciting the facts, and the prisoner was rearrested and reconfined in the penitentiary. He sought release by habeas corpus, but the court denied his application, holding that he was not entitled to a judicial determination of the fact of forfeiture and that the conditions were valid. The court said: "It (the pardon) expressly provides that the Governor may by his warrant revoke it upon such showing of a violation of the conditions as he may deem sufficient. Upon its revocation the legal status of the petitioner must be regarded the same as it was before the pardon was granted. It must be remembered that the pardon was an act of grace. The petitioner had no right to demand it. It was founded on no right which he could enforce in any court. What he accepted was in the nature of a favor or gift. It was not such a contract as entitled him to have a judicial determination of forfeiture, in the face of his stipulation that the Governor might revoke it upon such showing as might be satisfactory to him": *Arthur v. Craig*, 48 Iowa, 264 (30 Am. Rep. 395).

A convict in Indiana was pardoned on condition that "he leave and remain out of the state during the time for which he was sentenced." The pardon stipulated that the Governor reserved the right to revoke it at any time upon the condition being broken, and that he should be the sole judge of any violation thereof. The Governor determined that the prisoner had violated the conditions imposed and directed that he be rearrested and remanded to prison, which was done accordingly. Upon habeas corpus the court held that the Governor granted the pardon as a matter of grace, and not as a duty, and could impose such conditions as he saw fit, and, when a prisoner accepted it, he by implication acceded to all its terms and conditions, and that the Governor had the power to order his rearrest and return to prison at any time. The court said the relation of the prisoner to the Governor after the issuance of the conditional pardon was like that of bail to their principal, who, according to the quaint language of the old books, "have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge": *Woodward v. Murdock*, 124 Ind. 439 (24 N. E. 1047). The same principle was announced by the Supreme Court of Massachusetts in *Kennedy's Case*, 135 Mass. 48.

Judgment of the court below is affirmed.

AFFIRMED.

Argued 14 February, decided 9 April, 1907.

SEABROOK v. COOS BAY ICE CO.

89 Pac. 417.

BOUNDARIES—NATURE OF SURVEYOR'S EVIDENCE.

1. In testifying as to the location of points in public surveys, it must be remembered that surveyors are only witnesses, and they should confine their testimony to what acts they performed, leaving the conclusion as to the location of the point to the jury, and the court can determine, as a matter of law, whether they have pursued the correct method in the survey.

BOUNDARIES—MANNER OF LOCATING CORNERS.

2. Where, on an issue as to the location, on the ground of the boundaries of a tract of tide lands, the description in the deed called for a place of beginning a certain number of chains northward from a "post at angle in meander line" and it was then stated that the post was a certain num-

ber of chains north from a certain corner of "lot No. 2 in section 26," etc., the proper method was to find the angle post, and, if lost or obliterated, to find it from some known corner and not to fix a starting point according to the number of chains mentioned from the corner of the lot.

BOUNDARIES—CALLS CONTROL MEANDER LINE.

3. A deed of tide land by the state described by metes and bounds conveys the territory within the calls, which are not controlled by the meander lines of the original United States survey, though one of the calls is "thence along the meander line," it being presumed that the line thus referred to means the actual high water mark, rather than the line of the government survey.

BOUNDARIES—PURPOSE OF MEANDER LINES.

4. In surveying fractions of government land adjoining navigable waters, the meander line is not intended to mark the boundary, but only to indicate the winding lines of the banks.

ADVERSE POSSESSION—SUFFICIENCY OF EVIDENCE.

5. Adverse possession of tide land improved only by some scattered piling is not established by the payment of taxes, and the occasional receipt of rent for tying scows and other floating craft to the piling.

MAPS AS EVIDENCE.

6. A map made from miscellaneous sources of information, without an actual survey on the ground, is not competent evidence of the location of objects or of the distances shown thereon.

From Coos: LAWRENCE T. HARRIS, Judge.

Statement by MR. JUSTICE EAKIN.

This is an action of ejectment by E. B. Seabrook against the Coos Bay Ice & Cold Storage Co. Plaintiff's grantor, Charles E. Fox, on November 25, 1874, purchased from the state tide lands described in his deed as:

"Beginning at the meander post on the line between sections 26 and 27, Tp. 25 S., R. 13 W., Will. Mer., and running along the meander line S. 58° E., 22.30 chs.; S. 51° E., 10 chs.; S. 9° E., 1.74 chs.; thence east, 4.50 chs., to low-water line; thence along low-water line, N. 9° W., 1.74 chs.; N. 51° W., 10 chs.; N. 45° W., 20 chs.; thence west, 8.50 chs., to place of beginning."

And on April 10, 1873, the state conveyed to G. Webster certain tide lands described as:

"Beginning 2.21 chains northward from a post at angle in meander line of Coos Bay—said post being 7.50 chains, N. 17° E. from the N. E. corner of lot No. 2 in section 26, Tp. 25 S., R. 13 W., Will. Mer., and running northward along the meander line 16.75 chains; thence east 4.50 chains to low-water mark;

thence southward, along low-water line, 16.75 chains; thence west 4.50 chains, to place of beginning."

On February 9, 1883, the state conveyed to the plaintiff's grantors, Lapp and Hall, the following described tide lands, viz.:

"All of the tide lands lying in front of, and abutting on, lot 4 of sec. 26, Tp. 25 south, range 13 west, except that tract heretofore, on the 25th day of Nov. 1874, sold to Chas. E. Fox, and excepting that tract sold to G. Webster, April 10th, 1873."

Plaintiff claims that there is a tract of tide land about 82 feet wide lying between the Fox and the Webster tracts, and that defendant's buildings extend over upon said strip about 20 feet south of the south line of the Fox tract.

There was a judgment in favor of defendant, from which the plaintiff appeals.

REVERSED.

For appellant there was an oral argument by *Mr. John S. Coke*, with a brief over the name of *Coke & Seabrook*, to this effect.

I. The true boundary between the upland, which is the property of the Federal government, and the tide land, which belongs to the state, is the true or actual meander line of the stream or body of water, viz.: high-water mark: *Minto v. Delaney*, 7 Or. 337; *Moore v. Willamette Transp. & L. Co.* 7 Or. 355; *Andrus v. Knott*, 12 Or. 501 (8 Pac. 763); *Johnson v. Knott*, 13 Or. 308 (10 Pac. 418); *Weiss v. Oregon Iron & S. Co.* 13 Or. 496 (11 Pac. 255); *Turner v. Parker*, 14 Or. 340 (12 Pac. 495); *Shively v. Bowlby*, 152 U. S. 1 (14 Sup. Ct. 548: 38 L. Ed. 331); *Northern Pine Land Co. v. Bigelow*, 84 Wis. 157 (21 L. R. A. 776); 5 Cyc. 893, note 99.

II. The meander lines in surveys by the general government are not run as boundaries, but to ascertain the sinuosities of the shore, so that the stream, and not the meander line as actually run, is the true boundary: 5 Cyc. 899, note 18; 4 Am. & Eng. Enc. Law (2 ed.), 776; *Railroad Co. v. Schurmeier*, 74 U. S. (7 Wall.) 272; *Hardin v. Jordan*, 140 U. S. 371 (11 Sup. Ct. 838); *Whitehurst v. McDonald*, 3 C. C. A. 215; *Everson v. Waseca*, 44 Minn. 247 (46 N. W. 405); *Brown Oil*

Co. v. Caldwell, 35 W. Va. 95 (13 S. E. 42: 29 Am. St. Rep. 793); *Sizer v. Logansport*, 151 Ind. 626 (50 N. E. 377: 44 L. R. A. 814); *Provins v. Lovi*, 6 Okl. 94 (50 Pac. 82).

III. The question as to the location of a boundary being one of fact, a surveyor cannot give his opinion as to where it is, his duty is to confine himself to a statement of what he did: 5 Cyc. 967, 968; *Kelso v. Stigar*, 75 Md. 376 (24 Atl. 18); *O'Brien v. Cavanaugh*, 61 Mich. 368 (28 N. W. 127); *Radford v. Johnson*, 8 N. D. 182 (77 N. W. 601); *Case v. Trapp*, 49 Mich. 59 (12 N. W. 908); *Burt v. Busch*, 82 Mich. 506 (46 N. W. 790).

IV. A surveyor who has surveyed the premises may state what he found and explain his statements by a map (*Rowland v. McCown*, 20 Or. 538: 26 Pac. 853), and a map may be received in evidence when accompanied with testimony that it correctly shows the true location of the objects marked thereon: *Scanlan v. San Francisco & S. J. V. Ry. Co.* 128 Cal. 586 (61 Pac. 271); *Burwell v. Sneed*, 104 N. C. 118 (10 S. E. 152); *Hoge v. Ohio Ry. Co.* 32 W. Va. 562 (14 S. E. 152: 25 Am. St. Rep. 836).

But a map made by one person from notes of a survey made by another is incompetent, where there is no evidence of the correctness of the notes (*Hays v. Ison* (Ky.), 72 S. W. 733; *Donohue v. Whitney*, 133 N. Y. 178: 30 N. E. 848), nor is a map admissible upon the testimony of one who claims to be familiar with the premises, but did not survey the ground: *Smith v. Bunch*, 31 Tex. Civ. App. 541 (73 S. W. 559).

V. To render maps admissible in evidence as independent proof of the location of a boundary they must be (1) official, or (2) have been recognized as correct by the former owner, or (3) be referred to in the deed or grant, or (4) must be authenticated ancient documents: 5 Cyc. 963, 964; *Jones v. Huggins*, 1 Dev. 223; *Ellison v. Branstrator*, 153 Ind. 146 (54 N. E. 433); *Scanlan v. San Francisco & S. J. V. Ry. Co.* 128 Cal. 586 (61 Pac. 271); *Burwell v. Sneed*, 104 N. C. 118 (10 S. E. 152); *Hoge v. Ohio Ry. Co.* 32 W. Va. 562 (25 Am. St. Rep. 836: 14 S. E. 152).

For respondent there were oral arguments by *Mr. Edward Louis Coburn Farrin* and *Mr. James Monroe Upton*, with a brief of this effect.

1. All surveys of tide lands shall conform to and connect with the adjoining surveys of the United States, so far as may be practicable, and the certificate of the county surveyor, describing the lands applied for by metes and bounds, and stating the quantity thereof, shall be necessary to complete the purchase: *Laws 1872, p. 132, § 7.*

2. When the description specifies along the meanderings of the stream, and then gives the courses and distances, the meander line must be followed: *Turner v. Parker, 14 Or. 340 (12 Pac. 495).*

Opinion by MR. JUSTICE EAKIN.

The most important issues in the case are (1) is there a strip of tide land between the Fox and the Webster tracts; and, if so (2) is the south line of the Fox tract south of defendant's buildings? And both depend upon the proper and accurate tracing upon the ground of the boundaries of the tracts as given in the deeds.

Defendant claims that plaintiff has no standing in this court, because he has not established the existence of any tide lands between the Fox and the Webster tracts. The location of the Webster tract is not traced by the witness Whereat from the beginning point named in the deed. The survey of this tract, as set out in the deed, is tied to an angle in the government meander line; the call being: "Beginning 2.21 chains northward from a post at angle in meander line of Coos Bay." It is conceded in the evidence and disclosed by the plaintiff's Exhibit 10, that there is an angle in the government meander line 63.9 feet northerly from the point adopted by Whereat as the tie corner, which last point is not an angle in the meander line, and Whereat evidently justifies himself in ignoring this angle by reason of the further description in the deed of that angle post as "being 7.50 chains north 17° east from the northeast corner

of lot 2 in section 26"; but the northeast corner of lot 2 is not a corner in the United States survey, and it can only be ascertained by a subdivision of section 26 in the manner provided by the United States Land Department. It may be conceded as to all government surveys that there will be some discrepancies both as to measurements and courses between the field-notes and the measurements on the ground, and the surplus or shortage must be apportioned in subdividing the section, which in this case is liable to make lot 2 more or less than 20 chains wide, and thus vary its point of intersection with the meander line; that is, quarter quarter corners must be established at points midway between section and quarter section corners: Gen. Land Office Circular, Restoration of Lost Corners and Subdivision of Sections, dated March 14, 1901, p. 15. And in a fractional quarter section each of such subdivisions will constitute a lot; and as neither the west nor the south lines of the northwest quarter of section 26 is full, that fractional quarter should constitute lot 4, and the reference in the deed treats it as one lot.

1. Both the witness Whereat and the deed refer to the northeast corner of lot 2 as an established corner; but it is not a corner of the public survey, and must be ascertained by the established method. The surveyor, in testifying in relation thereto, must state more than the result; he must detail his survey in locating such corner, and it will then be a legal question whether his method is correct and a question of fact whether the result is correct: 5 Cyc. 967; *Radford v. Johnson*, 8 N. D. 182 (77 N. W. 601); *O'Brien v. Cavanaugh*, 61 Mich. 368 (28 N. W. 127).

2. Here Whereat's method was incorrect. He establishes the tie corner from the northeast corner of lot 2, without disclosing that such corner is correctly determined, but when determined, it does not control the tie corner. The Webster deed fixes the starting point at 2.21 chains northward from the post at angle in meander line. That angle post in the meander line of the public survey was adopted by the county surveyor as the basis

of his survey of the Webster tract, and his starting point is the point to be ascertained, and must control now; and if that angle exists, and is known, it is not necessary to look further. If lost or obliterated, it must be found or re-established from some known corner by the approved methods. The reference in the deed to the northeast corner of lot 2 is only as a witness corner to identify and aid in finding the angle mentioned, and not to control it; and Whereat's survey or tracing is erroneous in adopting as a tie corner the point 63.9 feet southward on the meander line from the angle mentioned. But this error in tracing the Webster tract does not necessarily determine that plaintiff had not a *prima facie* case, at least it is not here for decision by this court.

3. The case was tried in the lower court upon the theory that the calls in the deed to Fox for the west line of the tract should give way to the meander line of the public survey, which would locate the south line of the Fox tract about 60 feet south of its location by the calls of the deed. By Section 7 of the "act to provide for the sale of tide and overflowed lands of the seashore and coast" (Laws 1872, pp. 129, 132), under which the Webster and Fox deeds were issued, it is provided that the applicant to purchase such land shall, at his own expense, cause the same to be surveyed by the county surveyor, such survey to conform to and connect with the survey of the United States so far as may be practicable, describing the lands by metes and bounds, and this provision has been retained in all amendments and subsequent acts relating thereto. This survey is presumed to be the true meander line of the bay at that date, and such survey constitutes the basis upon which the state land board acts in making the deed, and, there being no ambiguity in the deed, its calls must control. It is settled in this state that where a stream, lake or bay is meandered by the public survey, the shore becomes the real boundary, and not the meander line as surveyed, if there is found to be a discrepancy between the two: *French Livestock Co. v. Springer*, 35 Or. 312 (58 Pac. 102); *Johnson v. Tomlinson*, 41 Or. 198 (68 Pac. 406). The county surveyor in this

case determined that there was a discrepancy between the meander line of the public survey and the shore line. His decision was accepted and acted upon by the state land board, and is final until an error is shown and the deed corrected in some manner authorized by law. If permanent and visible or ascertained boundaries or monuments are mentioned in the deed as the boundary or corners of the survey, such boundary and monuments should control (though this rule is not an inflexible one (*Hale v. Cottle*, 21 Or. 580: 28 Pac. 901; *Baker County v. Benson*, 40 Or. 207, 218: 66 Pac. 815); but in this deed, the only reference is "along the meander line," which can only mean the actual meander line of the bay, because the meander line of the public survey is not a permanent visible or ascertained boundary.

4. In *Railroad Co. v. Schurmeier*, 74 U. S. (7 Wall.) 272 (19 L. Ed. 74), it is held: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream"; and this is the rule generally, both in the state and federal courts. Therefore the court erred in admitting evidence tending to establish the west boundary of the Fox tract upon the meander line of the public survey, and also erred in instructing the jury to the effect that they might ignore the calls in the deed.

5. As to the question of adverse possession by the defendant, the only proof is the testimony of Patrick Hennessey, superintendent of the Oregon Coal & Navigation Co., the defendant's grantor, and he says the company had possession of some tide land there.

"About all I did was to pay the taxes on it. There were no buildings on it, some piling. We received rent money for scows and a piledriver, tied up there two or three years ago. These houseboats were occupied as dwellings. I do not know where the piles were driven, as it has been a long time ago. It is more than 10 years since they were driven. The houseboats were not there continuously. Once in a while they were tied up there during this period. The piles were not connected with each other in any way."

This evidence does not tend to establish adverse possession: *Montgomery v. Shaver*, 40 Or. 251 (66 Pac. 923). Actual occupancy, *pedis possessio*, is necessary to constitute such possession as will ripen into title. Therefore, it was error for the court to submit the question of adverse possession to the jury.

6. It was also error to admit in evidence Exhibits K and L, defendant's testimony, for the reason that such exhibits are only competent as evidence, when identified, as disclosing relatively the situation upon the ground. Such a map is intended to demonstrate to the jury the actual condition upon the ground and the true relative positions of lines or objects mentioned, but when so identified by one competent witness, it may be admitted, and if its correctness is disputed, it is a question for the jury to determine the fact: *Hays v. Ison* (Ky.), 72 S. W. 733; *Donohue v. Whitney*, 133 N. Y. 178 (30 N. E. 848). The witness who drew this map says he made no measurements on the ground as to lines and angles or the relative positions of defendant's property or buildings, but used as his data the boundaries mentioned in the deeds, the city plats, and the field notes of the meander line of the public survey. From such data it is impossible for him to locate the exact relative positions of defendant's buildings and the south line of the Fox tract.

The judgment is reversed, and the cause remanded to the lower court for a new trial.

REVERSED.

Argued 27 February, decided 9 April, 1907.

PORTLAND IRON WORKS v. WILLETT.

89 Pac. 421, 90 Pac. 1000.

APPEAL—OBJECTIONS IN LOWER COURT—SPECIFIC PERFORMANCE.

1. A complaint for the specific performance of a contract of employment which, after stating the time and object of the employment, alleges that it was stipulated that the employe should be paid at a specified rate per month, and that in consideration thereof he agreed to design such machinery as might be required and to give the employer the benefit of the best of his knowledge, and that in consideration of the employment, any improvements which the employe might conceive should become the property of the employer, is sufficient when attacked for the first time on appeal as against the objection that the employment and not the salary was the consideration for the agreement as to the ownership of the im-

provements which the employe might conceive, and that such employment was not a sufficient consideration.

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT TO INVENT.

2. Where, in a contract of general employment of inventing skill, there is an express agreement that the employer is to be the owner of any invention made by the employe, the employer becomes the owner of the employe's inventions.

SPECIFIC PERFORMANCE—CONTRACT TO INVENT—DEGREE OF PROOF.

3. To warrant a decree for the specific performance of a contract stipulating that the inventions of an employe made during his employment shall become the property of the employer, the contract must be clearly proven and its terms as to subject-matter, consideration and other-essentials must be specific.

MASTER AND SERVANT—EVIDENCE OF EMPLOYMENT TO INVENT.

4. On the issue of the existence of a contract of employment by letters, it appeared that the employe offered his services to the employer, who replied that he desired a man in the capacity mentioned, and inquired whether the employe was a machine draughtsman. The employe replied by submitting blue prints of drawings of machinery previously designed by him, and stated that all of the machines designed were in successful operation, and that he desired \$1,800 per year to start with. The employer replied that he accepted the employe's proposal with the understanding that drawings, patterns or designs of machinery made by the employe should belong to the employer, to which the employe replied that he would regard the drawings and patterns, etc., as belonging to the employer as a part of the consideration for the salary. *Held*, sufficient to establish a contract of employment.

SAME—CONSTRUCTION OF CONTRACT TO INVENT.

5. An employer accepted the employe's offer to work for him with a proviso that the employer should be the owner of drawings, patterns and designs of machinery made by the employe during his employment. The employe replied that any improvements which he might make the employer was welcome to have, and he would assign patents therefor to the employer upon payment of the expense; but that these matters could be arranged in a personal interview. *Held*, that the employe did not reserve for future negotiation, the question of the ownership of any improvements which he might make in machinery, especially where he, without any further negotiation, went to work and suggested to the employer that a design was patentable, but that the remark about the interview related to the details of procuring and assigning the patents.

SAME—MEANING OF DESIGN.

6. An employe tendered his services to a sawmill manufacturer, and stated that he had designed machines which were in successful operation. The employer accepted the proposal of the employe with the understanding that drawings, patterns or "designs" of machinery made by the employe should be the property of the employer. *Held*, that the word "designs" was intended by both parties to cover the invention of any new machine or improvement thereof, and was not used in the sense of ornamental design.

SAME—TIME OF CONTINUANCE OF CONTRACT.

7. A contract of employment stipulating a specified monthly compensation for the time the employe shall remain, and providing that the con-

tract may be terminated by either party on notice, is for an indefinite time and cannot be construed as an employment for a year.

SAME—OWNERSHIP OF INVENTIONS BY EMPLOYE.

8. Under a contract of employment stipulating that drawings, patterns or designs of machinery made by the employe during the time of his service shall belong to the employer, all inventions worked out during the continuance of the contract, and the patents therefor, belong to the employer.

SPECIFIC PERFORMANCE—CONDITION PRECEDENT.

9. Where a contract of employment stipulated that inventions made by the employe should be the property of the employer, and the employe made inventions, and incurred expenses in making applications and procuring patents, the employer must, in order to compel the employe to surrender title to the patents, pay the expenses incurred.

COSTS ON APPEAL—BRIEFS—PRINTING.

10. On a motion to retax costs of the printing of appellant's abstract and brief, the issue to be determined is not the reasonableness of the charges, but what was actually paid by appellant.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. COMMISSIONER SLATER.

This is a suit for specific performance by the Portland Iron Works against C. W. Willett. Plaintiff is a corporation engaged in devising, manufacturing and selling machinery, particularly for sawmills, and has its construction works or machine shops at Portland, Oregon. Defendant was a resident of Seattle, Washington, and, having special knowledge and experience in devising, designing and constructing such machinery, on July 5, 1904, solicited employment with it in that capacity. As the result of a series of letters between them defendant was so employed at a stated salary, it being expressly agreed that all drawings, patterns and designs of machinery, made by him while in its employ, should become and be the property of plaintiff. Defendant entered on the performance of said work on July 19, 1904, and continued therein until February 1, 1906, receiving therefor the agreed salary of \$150 per month, during which time, and while performing his duties under said employment, defendant conceived, invented and perfected certain improvements in a log or cant hook dog, being an attachment of and used on a sawmill carriage, a gang edger and power networks of a sawmill carriage, using, to accomplish said inventions, the

time of his employer as well as its tools and materials and the time of its other employes. During the time of his employment, and without plaintiff's consent, he applied for patents on each of said improvements in his own name and at his own expense. The company, having learned of such acts, demanded that he disclose to it all the facts concerning said applications for patents, and that he assign said inventions and applications for patents thereon, claiming to own the same by the terms of the said contract of employment. He refused, and denied that the company had any rights therein, whereupon it brought this suit.

The complaint, after alleging the foregoing facts, contains the following allegation:

"That in and by said contract it was furthermore, in consideration of the employment of said defendant by plaintiff as aforesaid, expressly stipulated that any and all improvements which defendant might conceive and design relating to hand-mills, carriages, feeds, rolls and edgers, while continuing in the said employ of the plaintiff, should become and be the exclusive property of the plaintiff; and that the plaintiff might at its own option and expense patent any of the improvements so conceived and designed by the defendant; and the defendant expressly agreed to make such applications for letters patent on such devices relating to sawmill machinery as plaintiff elected to have patented, and also to duly assign said inventions and letters patent to be obtained therefor to the plaintiff, for the purpose of vesting in the latter the whole right, title and interest in and to such invention and letters patent."

In addition, it was alleged, in effect, that plaintiff's object in employing defendant was to secure exclusive and valuable rights in such improvements, whereby it would obtain particular advantage over its competitors; that defendant well knew plaintiff's object and in furtherance thereof entered into its employment; that said improvements are valuable and patentable, and that defendant has secretly and in fraud of plaintiff's rights applied for letters patent thereon; that he refused to disclose to plaintiff the date or number of his applications for patent and refuses to assign over any of them to plaintiff, but declares his purpose and intention is to prosecute his applications to

patent for his own exclusive use and benefit; that plaintiff at all times has been and still is willing to bear all expenses necessarily incurred in prosecuting applications for letters patent of the United States on each of said improvements and making a transfer thereof to the plaintiff. The prayer is that defendant be required to assign to plaintiff each of said improvements and letters patent to be obtained thereon, for an injunction against the defendant, and for general relief.

The defendant answered by general denial of the complaint, and affirmatively alleged, in effect, that he agreed to work for the plaintiff for one year from about July, 1904, for \$1,800, to be paid in monthly installments of \$150, and that all original drawings, patterns and designs of machinery made by him while so employed should belong to plaintiff; but that any and all patentable devices and improvements invented by him should belong to him. By its reply plaintiff denied all the material allegations of new matter in the answer. After taking the testimony, findings in defendant's favor were made, and a decree entered thereon, dismissing the complaint, from which plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Theodore Justice Geisler*.

For respondent there was a brief and an oral argument by *Mr. Robert Catlin Wright*.

Opinion by MR. COMMISSIONER SLATER.

1. The sufficiency of the complaint was not challenged by demurrer, but it is now contended for the first time that it fails to state a cause of suit, for the reason that it alleges no consideration for the alleged express agreement on the part of the defendant that all improvements made by him while in plaintiff's employ should become and be its exclusive property. In the absence of a demurrer, all intendments must be taken in favor of the sufficiency of the pleading: *Fowler v. Phoenix Ins. Co.* 35 Or. 559 (57 Pac. 421); *West v. Eley*, 39 Or. 461 (65 Pac. 798); *Walker v. Harold*, 44 Or. 205 (74 Pac. 705). The com-

plaint, after stating the time and object of the employment, alleges:

"It was stipulated that the defendant should be paid by the plaintiff for his said services at the rate of \$150 per month for the time he was in the employ of the plaintiff; and that defendant in consideration thereof did promise and agree to design such machinery as might be required of him, and to give plaintiff the benefit of the best of his knowledge, skill and experience."

Immediately following this language, but in a separate paragraph, is the following:

"That in and by said contract it was furthermore, in consideration of the employment of said defendant by plaintiff as aforesaid, expressly stipulated that any and all improvements which defendant might conceive and design, * * should become and be the exclusive property of the plaintiff."

It is contended that the effect of the latter allegation is that the employment, and not the salary to be paid, is the alleged sole consideration for the succeeding alleged agreement as to the ownership of the improvements, and that it is not a sufficient consideration. But, however it may be as to the latter contention, it cannot be fairly concluded from the language quoted that the pleader intended to allege the latter as a separate and distinct agreement from the former, for his language clearly imports that the stipulation as to the ownership of improvements is a part of the contract of employment, and it must necessarily follow that the salary therein agreed to be paid is alleged as the consideration for the agreement as to the ownership of improvements made.

2. To entitle it to the relief demanded herein, plaintiff relies upon an alleged express contract that all improvements which defendant might conceive and design relating to bandmills, carriages, feeds, rolls and edgers, while in its employ, should become and be its exclusive property, and that it might at its option and expense patent the same, and that the defendant expressly agreed to make such applications for patents on any of such improvements as plaintiff might elect to have patented and assign the same over to plaintiff. It seems to be conceded by all

the decisions, and we think by the defendant herein, that when there is a special service of inventing under a special employment to invent for a consideration, the employer becomes the owner of the servant's invention; and the same result follows where, in a contract of general employment of inventive skill, there is an express agreement that the employer is to be the owner of any invention or improvement: *Annin v. Wren*, 44 Hun, 352; *Solomons v. United States*, 137 U. S. 342 (11 Sup. Ct. 88: 34 L. Ed. 667); *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403 (71 C. C. A. 207: 2 L. R. A., N. S., 1172).

3. But to warrant a decree for specific performance, such contract must be clearly and unequivocally proven, and its terms as to subject-matter, consideration and all other essentials, must be specific and unambiguous: *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403 (2 L. R. A., N. S., 1172: 71 C. C. A. 207). Plaintiff claims that the alleged contract is included in the correspondence which passed between it and the defendant immediately prior to his arrival in Portland and his entry into its service, and particularly in its letter of July 11, 1904, and defendant's answer of July 12, 1904; while defendant insists (1) that said letters amount to nothing more than negotiations for a contract, and do not in fact constitute the contract; (2) that by his letter of July 12, he expressly reserved for future negotiation the question of the ownership of such improvements; (3) that by the terms of plaintiff's letter of July 11, it was to be the owner only "of drawings, patterns and designs of machinery," made by defendant while in its employ, and not of the invention and letters patent that might be procured thereon, attributing to the word "design," the technical meaning as used in the patent laws of the United States; and (4) that whatever contract was made therein was to continue for the term of one year only from and after July 19, 1904, and that the said improvements were not completed until after the expiration of said term. We shall consider these respective issues in their order.

4. Parties may and often do enter into a contract by communicating through the post office, and as soon as a definite offer

is thus made and accepted there is a binding contract. Whether or not the correspondence shows an agreement is always a question of construction (9 Cyc. 293), and in case the correspondence consists of a series of letters resulting in a definite offer on the one side, and an acceptance on the other, they must all be construed together to ascertain the intention of the parties. The correspondence between these parties was initiated by defendant, and consists of a series of six letters in all, the most important of which are the fourth, plaintiff's letter of July 11, 1904, and the fifth, defendant's answer of July 12, 1904. Defendant opens the correspondence on July 5, by saying:

"I would be pleased to hear from you in regard to matter of building a bandmill and other sawmill specialties, and would be glad to have you make me an offer as to what salary you would be willing to give me to go to work for you and design a bandmill and such other machinery as you may deem advisable, draw mill plans and sell machinery on the road as circumstances might require. I believe I can satisfy you."

On July 8, plaintiff answers:

"We want a man in the capacity you mention, but you are comparatively a stranger to us, and we do not know whether you would fill the bill or not. What salary do you want to work for us a few months, or long enough for us to determine the value of your services, and agree or disagree on the subject? Are you a machine draughtsman, or do you make mill plans only, and we suppose in either event you have drawings you have made in the past which we should like to inspect previous to entering into any agreement? Let us hear from you and oblige."

July 10, defendant replied, submitting blue prints of drawings of sawmill machinery previously designed by him, concerning which he says:

"I may add that all of the machines I have designed are now in successful operation," and also saying: "I think I should have \$1,800 per year to start with, and I am satisfied that we could agree upon a future salary after we become better acquainted, and you have an opportunity to see the results of my work."

On July 11, plaintiff writes as follows:

"Replying to your favor of the 10th, we have decided to accept your proposal, with the understanding that should we find it necessary to discontinue the arrangement, your services are to be paid for on a basis of \$150 per month for the time you are in our employ. Another matter which has not been mentioned up to the present time, and should be fully understood in advance, is the matter of ownership of any drawings, patterns or designs of machinery made by you while in our employ, and it must be understood in advance that such are our property. We should like to have you come as soon as possible, as there are a number of deals coming up at the present time which it would be well for you to come in touch with."

To this defendant replies, July 12:

"Yours of the 11th received. I will say in regard to drawings, patterns, etc., of machinery which I may make while in your service, same will certainly be considered as belonging to you as a part of the consideration of my salary. I always like to retain a blue print of my drawings, but never dispose of same or turn them over to any other parties for gain or otherwise. In the event of my inventing a machine on original lines which is a success, both practically and financially, the usual practice is to assign an undivided half interest to the employer and the inventor to retain the other half, provided a patent is taken out. I have designed a great many machines and improvements, but have never applied for any patents as yet, and do not know that I ever will. I do not know of any machine which I would want to patent unless it might be a 'Pacific Coast Log Turner,' and this is in the air as yet. Any improvement which I may make in bandmills, carriages, feeds, rolls, edgers, etc., while in your employ, you are welcome to, and if you wish a patent on them, you pay for same, and I will assign it to you. These matters we can arrange in a personal interview."

Regarding time of continuation of our contract, would suggest that a proviso be made that either party thereto has the privilege of terminating same upon 30 days' notice. I will endeavor to come to Portland next Saturday or Sunday, and be ready to go to work Monday morning."

This correspondence certainly shows a definite offer on the one side to render certain services for a specified price, and an explicit acceptance on the other. It is conceded by defendant

that he went to work for plaintiff at its shop in Portland on July 19, 1904, and he does not testify that there was any other contract than that shown by these letters; in fact, he does testify that there were no further negotiations between them prior to his beginning work. Hence the controversy in this respect relates to the ascertainment of the scope of the contract, rather than to the existence of a contract.

5. Impliedly surrendering his first contention, however, and thereby admitting that these letters contain the contract, counsel for defendant urges that defendant expressly reserved for future negotiation the question of the ownership of any improvements which he might make in bandmills, carriages, feeds, rolls, edgers, etc., when he said in his letter of July 12, that "these matters we can arrange in a personal interview." We do not think this language, when taken in connection with the contract, is susceptible of such a forced construction. Plaintiff, by its letter of the 11th, accepted defendant's previous offer, but with a proviso to the effect that it should be the owner of any drawings, patterns and designs of machinery made by defendant while in its employ. This proviso amounts to a counter offer and called for an acceptance or rejection by defendant. He expressly accepted in terms the said counter offer and proceeds to explain in detail what he understands is meant thereby. He expressly assents that "any improvements which I may make in bandmills, carriages, feeds, rolls, edgers, etc., while in your employ, you are welcome to." There could be, therefore, nothing respecting that matter left to be arranged thereafter in a personal interview. A party to a contract cannot in the same breath agree to a thing, and also withhold it for future negotiations. But, in the same connection, defendant says to plaintiff, "If you wish a patent on them, you pay for the same, and I will assign it to you," and immediately follows the expression relied upon. It is more reasonable to say that defendant thereby referred to the manner and means of procuring patents and plaintiff evidently so understood it.

"When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail,

against either party, in which he supposed the other understood it; and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made": B. & C. Comp. § 712; *Pendleton v. Saunders*, 19 Or. 9 (24 Pac. 506).

This conclusion is also sustained by the subsequent acts of the parties. Defendant, according to his own testimony, went to work without further negotiations on these matters, and in the early part of the year 1905, he suggested to Mr. Clark, plaintiff's president and superintendent, that the lower guide to a band-mill which he had designed was patentable. While, on the other hand, Clark testified that when defendant came to work, he and defendant in a conversation between them referred to the matter of drawing up a future agreement, but it was decided by them that what had been outlined in their letters covered all the contract which was necessary, and for that reason no formal contract was drawn up.

6. Defendant also urges in his answer and in his testimony that all he agreed to in said letters was that plaintiff should be the owner of all drawings, patterns and designs made by him, and, in his brief, his counsel urges that the word "design" was never intended by either party in the correspondence to cover the invention of a "new and useful art, machine, * * or any new and useful improvement thereof"—quoting from Section 4886, Rev. Stat. U. S. (5 Fed. Stat. Ann. 421: U. S. Comp. St. 1901, p. 3382), relating to patents—but that the word "design" as used in the United States patent laws refers to "ornamental design" for an article of manufacture.

"The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless admissible that they have a technical, local or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement shall be construed accordingly": B. & C. Comp. § 709.

No evidence was offered by defendant, tending to show that the word "design" was used by plaintiff and himself when writing said letters in the technical sense now attributed to the

word by him, nor that he so understood it, but there is ample evidence in defendant's letters of July 10 and 12, that he then understood and interpreted the word "design" as equivalent to "devise" or "invent." In the former letter he says: "I may add that all of the machines I have designed are now in successful operation," evidently using the word with reference to the utility of the machines and not to their ornamentation. It was in answer to this letter that plaintiff said:

"Another matter which has not been mentioned up to the present time, and should be fully understood in advance, is the matter of ownership of any drawings, patterns or designs of machinery made by you while in our employ, and it must be understood that such are our property."

Now, how did defendant understand and interpret this counter proposition from plaintiff? Why, by drawing a distinction between inventing a machine on "original lines," in which event, the practice was, he says, to assign an undivided one-half interest to the employer and the inventor retain the other half, and inventing "improvements" in bandmills, carriages, feeds, rolls, edgers, etc., which latter were to belong to plaintiff. Moreover, defendant does not claim that he was employed to make ornamental designs of machinery or that he did that kind of work, but he did understand that he was employed to devise and invent useful improvements, and he in fact did that kind of work. In that sense the parties used the word "design" in their letters, and they must be construed accordingly.

7. The last contention of defendant to be noticed is that the contract of employment was to last but one year, and terminated in July, 1905, before any of the improved machines were completed, and that after that time he worked under a new contract; but this contention has less to commend it than those already noticed. The employment was expressly for an indefinite period, terminable by either party on thirty days' notice. So long as defendant continued to work without giving such notice, and accepted the agreed pay of \$150 per month, he was bound by all the terms of the original contract. No such notice was given prior to the middle of January, 1906, just before

defendant quit plaintiff's service. There is some evidence on the part of defendant tending to show that an effort was made by him some time after July, 1905, to procure a new and different contract with plaintiff, but the negotiations to that end never culminated in a contract.

8. It is admitted by the defendant that the alleged improvements and inventions were made and completed, and the said applications for patents were made by the defendant, before he quit the service of plaintiff. His application for patent on the "cant hook dog" is dated August 14, 1905, having serial number 274,156; on the "gang edger," January 4, 1906, serial number 64,222; and on the "power set works," February 30, 1905. The drawings and specifications of each of said inventions attached to the complaint are admitted to be true and correct descriptions thereof, and it is also admitted that they are patentable. The record further shows that defendant has been to some expense in making said applications, but the amount thereof is not disclosed. Having determined that by the express contract of the parties such inventions were to be the property of plaintiff, and the contract being explicit and free from ambiguity, and based on a sufficient consideration, and the subject-matter of the suit being definitely ascertained and described, defendant is in equity bound to assign the same over to plaintiff.

9. The decree of the lower court should therefore be reversed, and a decree entered requiring the defendant to assign and transfer to plaintiff the said three inventions upon the payment by plaintiff to defendant of the latter's expenses incurred in making said applications and procuring patents, to be hereafter ascertained by the lower court, with a perpetual injunction against assignment thereof by defendant to any other person.

REVERSED.

Decided 2 July, 1907.

ON MOTION TO RETAX COSTS.

Opinion by MR. COMMISSIONER SLATER.

10. Appellant filed its cost bill, claiming, in addition to the other items not involved here, the following: For printing of abstract, \$32.15; brief, \$40.20; reply brief, \$12.50—making for these items \$84.85. Thereupon respondent objected to each of these items, on the ground that each charge exceeded the actual cost thereof, and that the abstract contains only 24 pages, the first brief 35 pages, and reply brief 9 pages; and he objected to the taxing of an amount for any of said items greater than the actual cost. In support of its cost bill, appellant presented and filed the affidavit of its attorney, from which it appears that the amounts of the items claimed, but objected to, were incurred and paid by appellant. To this affidavit is attached receipted bills for the items and amounts charged. However, in the receipted bill for the printing of the abstract, it is itemized as containing 36 pages, whereas it contains but 26 pages, including 2 pages for the cover, which is customary. In passing upon the matter, the clerk estimated from the amount, viz., \$32.15, charged for the number of pages stated in the bill, viz., 36, for the abstract, that the rate of charge was 85 cents per page, and, as the rate charged for the remaining items was in excess of that rate he accordingly reduced the amounts charged, and allowed the following: For abstract, 26 pages, including cover, \$22.10; first brief, 37 pages, including cover, \$31.45, and the second brief, 11 pages, including cover, \$9.35—from which this appeal is taken.

It is apparent from an inspection of the receipted bills attached to appellant's proof that the entry of 36 instead of 26 pages for the abstract, was a clerical error, and the clerk was misled in making that the basis of his computation. The issue to be determined is not the reasonableness of the charges, but what was actually paid. Appellant offered proof to support the cost bill, to the effect that the amounts charged were paid, and

there is nothing offered here to controvert that fact. It appears, also, that the abstracts and briefs are printed in small pica, so that, under rule 23 of this court (35 Or. 603, 37 Pac. ix), appellant is entitled to the actual cost of printing its abstract and briefs not to exceed \$1.25 a page. It follows that the items to which objection has been made should be allowed in the following amounts: For abstract, 26 pages, including cover, \$32.15; for brief, 37 pages, including cover, \$40.20; for reply brief, 11 pages, including cover, \$12.50—total \$84.85.

REVERSED: OBJECTION TO COSTS DISALLOWED.

Decided 12 January, rehearing denied 9 April, 1907.

STATE v. MEGORDEN.

88 Pac. 306.

**APPEAL—REVIEWING RULING ON CHALLENGE TO JUROR FOR BIAS—
HARMLESS ERROR.**

1. The disallowing of a challenge for cause to a juror who was then peremptorily challenged will not be reviewed where the challenger was not obliged subsequently to accept an objectionable juror, which cannot happen until the peremptory rights have been exhausted and a disqualified juror is then forced upon him over objection.

JURY—CONSTITUTIONALITY OF STATUTE.

2. Section 123, B. & C. Comp., providing that, on the trial of a challenge for actual bias, although it appears that the juror challenged has formed or expressed an opinion from what he has heard or read, such opinion shall not be sufficient to sustain the challenge, but the court must be satisfied that the juror cannot try the issue impartially, does not conflict with Const. Or. Art. I, § 11, giving accused the right to trial by an impartial jury.

JURY—OPINION—ACTUAL BIAS.

3. A juror who testified that he was not acquainted with defendant; that he had read of the case and discussed it, but did not know whether the people with whom he talked knew all the facts; that he had formed an opinion which it would take considerable evidence to remove, but did not know that he had ever expressed it; that he would be willing, if he were on trial, to have one sit on the jury who was in the same frame of mind; that he could enter on the trial giving defendant the presumption of innocence; that he knew nothing about the case except what he had read or heard; that he had read about it at the time and had seen a little notice of it since; that his opinion was based on the truth of the report he had heard and if it developed on the trial that it was false he would not regard it as evidence in the case and could try the case impartially—is not disqualified: *State v. Miller*, 46 Or. 217, distinguished.

EXPERT—EFFECT AND SCOPE OF OBJECTION.

4. An objection to a question asked of an expert that it is "incompetent, irrelevant and immaterial, upon the ground that a proper hypothesis or foundation had not been laid for asking the question," goes only to the competency of the question.

EXPERT WITNESS—HYPOTHETICAL QUESTION.

5. Where an expert has examined a wound and described it to the jury, it is not necessary to propound in a hypothetical form a question as to its effect.

EXPERT—THEORETICAL KNOWLEDGE—COMPETENCY.

6. A regularly graduated, licensed and practicing physician is competent to testify as to the effect of a blow on a person's head as described by other witnesses, although he had never seen or treated a case of the kind.

WITNESS—LEADING QUESTIONS ARE DISCRETIONARY.

7. It is discretionary with the trial judge to permit or refuse leading questions, and where he permits such questions to be asked of children 14 and 18 years of age who are called as witnesses against their father on a trial for killing their mother, he has acted wisely.

INSTRUCTIONS MUST BE CONSIDERED AS A WHOLE.

8. Instructions to a jury must be considered as a whole, and, if they are substantially correct and could not have misled the jury, the judgment will not be reversed because some instruction considered alone may be subject to criticism.

REFUSING REQUESTS ALREADY COVERED.

9. Refusal to give specially requested instructions already covered by the charge given is not error, though such requests are correct statements of the law.

APPEAL—NECESSITY OF ERROR APPEARING IN THE RECORD.

10. Timely and proper exceptions must be taken in the trial court and properly preserved in the record on appeal before error predicated on instructions will be considered on appeal.

INSTRUCTION AS TO PRESUMPTION OF INNOCENCE.

11. Refusal to give an instruction in a criminal trial that the presumption of innocence "follows him in the trial of this case until the contrary is shown beyond a reasonable doubt" is not error where an instruction was given that defendant "is presumed to be innocent until the contrary is proven," the two being substantially the same.

INSTRUCTION AS TO MORAL CERTAINTY—HOMICIDE.

12. Refusal to give an instruction in a murder trial that the presumption of innocence "must be overcome by competent evidence which convinces you of his guilt to a moral certainty" is not error where an instruction is given that "moral certainty, only, is required, or that degree of proof which produces conviction in an unprejudiced mind."

DEGREE OF CRIME—INSTRUCTION AS TO REASONABLE DOUBT.

13. The question of reasonable doubt in a murder trial as to murder in the first degree is fully covered in an instruction that, if it should appear "beyond a reasonable doubt that the defendant had committed a crime which is included in the crime charged in the indictment, and there should still remain in your minds a reasonable doubt as to which degree

he is guilty of, then, in that case, the defendant is entitled to the reasonable doubt as to the higher crime or to the highest degree, and you can only return a verdict of guilty of the degree of the crime so included in the indictment as to which there is no reasonable doubt."

PROPRIETY OF INSTRUCTION ON INVOLUNTARY HOMICIDE.

14. A trial judge may with propriety refuse to instruct a jury as to the lesser grades of an offense charged unless there is evidence tending to show that the lesser offense was committed.

HOMICIDE—DELIBERATION—PREMEDITATION.

15. In a murder trial, there being some evidence that defendant's mind had been disturbed shortly prior to the killing, the court properly left the matter of time for deliberation and premeditation to the jury under an instruction that deliberation and premeditation must be evidenced by some proof that the design was formed and matured in cool blood.

INSTRUCTION NOT BASED ON FACTS.

16. An instruction which begins with a sentence inapplicable to the facts in a murder trial is properly refused.

CAUTIONARY INSTRUCTIONS USUALLY DISCRETIONARY.

17. Cautionary instructions in a murder trial, where there is nothing in the circumstances of the case making them necessary, are within the discretion of the court.

HOMICIDE—EVIDENCE OF DELIBERATION.

18. The evidence in this case is ample on the questions of deliberation and premeditation to support the verdict of murder, and for the court to have instructed the jury that the testimony was not sufficient on those points to justify a verdict of murder in the first degree would have been a clear invasion of the province of the jury.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE HAILEY.

The defendant Holiver Megorden was indicted in September, 1905, by the grand jury of Malheur County, Oregon, charged with the crime of murder in the first degree, in shooting and killing his wife, Mary Megorden, on March 28, 1905. A trial was had beginning on September 16, a verdict of guilty as charged was rendered, and the defendant sentenced to be hanged, from which sentence he has appealed to this court. The defendant and his wife had lived for 10 or 12 years near the town of Nyssa, Malheur County, Oregon, and for some years there had been considerable discord in their domestic affairs, and immediately prior to the homicide there had been talk of divorce and separation and a division of property between them. They had four children, a son Robert, about 18 years of age, a daughter

Olive about 14 years of age, and a younger son and daughter. On March 28, 1905, the defendant left home early in the morning and went to Vale, the county seat, returning in the afternoon. After leaving his team at home and getting a light lunch, he went to the town of Nyssa. He came back in the evening between 5 and 6 o'clock, and went into the kitchen of his home where his wife and four children were sitting, and the testimony of his son Robert and daughter Olive is to the effect that, shortly after he came in and took a seat, he asked his wife if she was going to cook for him any more. She replied that she had never said she would not, and he told her then that she would have to get out in the morning, to which she answered she would not do so, as she had as good a right as he to stay in the house. Thereupon he became angry and approached her in a threatening manner, using violent language and shaking his fist in her face, and his son Robert then stepped up and told his father not to strike his mother. Defendant then turned upon and struck the son; the mother and daughter pulled him off and he began striking at them. The son, having a small 22-caliber rifle near him, picked it up, and reaching over his mother and sister struck his father on the right side of the head with the barrel of the rifle, breaking the stock of the gun and making a wound, as described by the physicians who examined it, on the parietal bone, about $1\frac{1}{2}$ or 2 inches in length, commencing at or near the coronal suture and extending backwards and downwards toward the right ear, and extending through the scalp to the periosteum. When the defendant was struck he fell, but whether or not the blow knocked him down, or he fell over a chair, is not clear from the evidence. However, he immediately regained his feet and went out of the kitchen into another room, where he procured a pistol from a trunk which he kept there. When he came out with the pistol, he immediately started after his son, who, with the other members of the family, had run out of the house at the command of the mother, and chased the son for about 100 yards and shot at him three times, but failed to hit him. He then turned and started after his wife and daughter

Olive who had run up the lane in another direction from the son, and, after pursuing them for about 300 yards, overtook his wife, who, finding she could not get away, turned around and ran toward him, saying, as testified by her son: "Don't shoot, Holiver, don't shoot." But he knocked her back from him with his left hand, "and pulled down and aimed, and shot her" in the breast, then turned and walked away. He then went to Nyssa, called on Dr. Taylor, and had him examine his wound, and also told him he had shot and "hit" or "hurt" his wife, and asked the doctor to go and see her. After he had shot his wife and walked away, the son Robert and daughter Olive went to their mother and found her dead, and carried her body to a neighbor's. Shortly thereafter defendant was arrested.

AFFIRMED.

For appellant there was a brief over the names of *King & Brooke, Frank Harris* and *R. J. Slater*, with an oral argument by *Mr. William Rufus King*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, and *John W. McCulloch*, District Attorney, with an oral argument by *Mr. McCulloch*.

MR. JUSTICE HAILEY delivered the opinion of the court.

1. There are numerous assignments of error, but they can be grouped under a few heads. The first 17 assignments relate to impaneling the jury, and are based upon the action of the court in denying challenges for actual bias made by defendant. The defendant peremptorily challenged several jurors after his challenges to them for actual bias had been disallowed. After 11 jurors had been taken and before the last juror was called the defendant had exhausted all his peremptory challenges, but he accepted the last juror without challenge of any kind. It is now sought to review here the action of the court in disallowing the challenges for actual bias to such jurors peremptorily challenged. The erroneous overruling of a good challenge for cause, thereby compelling the use of a peremptory challenge, is not prejudicial error where it does not appear that the challenger was compelled

to accept an objectionable juror: 12 Ency. Pl. & Pr. 505. In this case the challenger was not compelled to accept an objectionable juror after exhausting his peremptory challenges, but, on the contrary, the juror was accepted without question as to his qualifications, and it must be presumed that he was qualified in every respect. In *Ford v. Umatilla County*, 15 Or. 313, 324 (16 Pac. 33), the rule as stated above is approved and authorities cited in support thereof. In *Holt v. State*, 9 Tex. App. 580, it is said: "Unless objection is shown to some one or more of the jury who tried the case, the antecedent rulings of the court upon the competency or incompetency of jurors who have been challenged and stood aside will not be inquired into in this court." The question here raised is exhaustively treated in *Loggins v. State*, 12 Tex. App. 85, where the gist of the matter is tersely stated, as follows: "The simple question, after the peremptory challenges are exhausted, is: 'Is the jury which finally tries the case impartial?' If so, we cannot imagine that the accused has any just ground of complaint with regard to it. All that the constitution, all that the law, requires and demands is a trial 'by an impartial jury.' If he makes no complaint or has no complaint to make of it as finally organized, the presumption is legitimate that it is impartial." Mr. Justice FIELD in *Hayes v. Missouri*, 120 U. S. 71 (7 Sup. Ct. 352: 30 L. Ed. 578), says: "The right to challenge is the right to reject, not to select, a juror. If from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained": *Spies v. Illinois*, 123 U. S. 131 (8 Sup. Ct. 21: 31 L. Ed. 80). In *Wooten v. State*, 99 Tenn. 189 (41 S. W. 815), the defendant had exhausted all his peremptory challenges when 11 jurors had been accepted and the twelfth juror was accepted without objection or challenge. Defendant on appeal sought to question the rulings of the lower court in disallowing his challenges for cause to the jurors whom he afterwards challenged peremptorily, but the court held that, unless defendant was forced to accept other jurors after exhausting his challenges, the question of the competency of the jurors challenged per-

emptorily could not be raised. To the same effect is *State v. White*, 48 Or. 416 (87 Pac. 137-141), recently decided by this court.

2. It is suggested, however, that our statute (Section 123, B. & C. Comp.) providing that, upon the trial of a challenge for actual bias, "although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially," is broader than the terms of Section 11, Article I of the state constitution, which declares: "The accused shall have the right to public trial by an impartial jury," and is therefore void. Similar statutes in other states have been held valid, and our statute is within the doctrine of such cases: *Spies v. Illinois*, 123 U. S. 169 (8 Sup. Ct. 21: 31 L. Ed. 80); *Jones v. People*, 2 Colo. 351; *Stout v. State*, 90 Ind. 1; *Territory v. Bryson*, 9 Mont. 32 (22 Pac. 147); *Stokes v. People*, 53 N. Y. 164 (13 Am. Rep. 492); *Cooper v. State*, 16 Ohio St. 328; *People v. Thiede*, 11 Utah, 241 (39 Pac. 837). This court in *Kumli v. Southern Pac. Co.* 21 Or. 505, 510 (28 Pac. 637), has practically so decided.

3. The only question, then, for determination regarding the impaneling of the jury is whether or not any of the jurors who tried the cause were disqualified. Of the 12 jurors who tried the case, 9 were accepted without challenge. Of the three remaining, one, Pennington, although challenged for actual bias, was, after further examination by counsel for defendant, accepted, thus waiving his challenge. One of the jurors challenged for actual bias, Patch, testified in substance that he was not acquainted with the defendant, nor to any extent in or about the town of Nyssa, although he knew a few people around there; that he had read of the case and discussed it with people, but as to whether they knew all the facts or not he could not say; that from what he had read and heard he had formed an opinion,

but did not know that he had ever expressed it, and that it would take considerable evidence to remove it, but that, if he were on trial, he would be willing to have one sit on the jury who was in the same frame of mind as he then was; that he could enter upon the trial of the case giving the defendant the presumption of innocence; that he knew nothing about the case except what he had read and heard, and that he had read of it about the time the homicide occurred, some time in the spring; that he had seen a little notice in the paper about it since; that the persons with whom he talked about the case knew about the same amount of facts as he did, and his opinion was based upon the truth or falsity of the report he had heard, and, if it developed on the trial that the report was false, he would not hang to it as evidence in the case, but would disregard the report he had heard if it was different from the evidence. He also stated that he would have no difficulty in disregarding the opinion he had and trying the issue in the case impartially. The other juror Lofton testified substantially the same as to his qualifications, and, the challenges being disallowed, exceptions were saved.

The facts stated by these jurors are practically identical with the facts stated by the jurors in the case of *State v. Armstrong*, 43 Or. 207, 217 (73 Pac. 1022). That case and the cases therein cited from this court upon the same point are conclusive upon the point raised here. The challenges were properly disallowed. It is claimed, however, that the case at bar is within the rule of *State v. Miller*, 46 Or. 485, 491 (81 Pac. 365). In that case the defendant, having exhausted all his peremptory challenges, was compelled to take a juror who had a fixed and positive opinion formed from hearing at least part of the testimony given at the former trial by the widow of the deceased, and from hearing other witnesses at such trial detail the testimony given by them. In other words, he had formed his opinion from what he had heard from witnesses who claimed to know the facts and had testified to them at a former trial, and not from hearsay and newspaper reports, as did the jurors in this case. That case is not applicable here.

4. Drs. Hoople and Taylor, witnesses for the state, each testified that he had examined the wound on defendant's head, and described it, and were then asked as to what effect such wound would have on the mental condition of the person receiving it, to which question defendant objected as "incompetent, irrelevant and immaterial, upon the ground that a proper hypothesis or foundation had not been laid for asking the question." The objection was overruled, and an exception taken. The objection only goes to the competency of the question: *State v. Martin*, 47 Or. 282 (83 Pac. 849); *Rogers*, Exp. Test. § 23.

5. Each of the witnesses having examined the wound and described it to the jury, it was not necessary to propound the question in a hypothetical form: 8 Ency. Pl. & Pr. 764. The opinions of the witnesses were based on the facts previously testified to by them, and were admissible within the rule of *State v. Simonis*, 39 Or. 111-118 (65 Pac. 595), and *State v. White*, 48 Or. 416 (87 Pac. 140).

6. Dr. Prinzing was then called in behalf of the state, and testified that he was a regularly graduated, licensed and practicing physician, residing at Ontario, Oregon, and had been practicing five years. He was then asked what the effect of a blow on a person's head, describing it as detailed by the two preceding witnesses, would have as to dazing or confusing the person, and answered that it would affect his reasoning faculties for a few moments. Before answering, the witness stated that he had never seen or had a case so struck in that place. An objection to the question on the ground that the witness was not qualified as an expert was overruled. The point raised by this exception is whether or not want of experience in exactly such a case as the one in question is sufficient to disqualify a practicing physician and surgeon of general experience in his profession. *Rogers*, Exp. Test. § 52, says: "If the witness is a physician or surgeon, he is not incompetent to express an opinion, because of his want of observation of any case like the one in question. * * It is not necessary, to qualify a medical witness to testify as an expert on the subject of wounds, that he should have

actually seen the wound in question. His testimony may be based upon a description of a wound given in court by those who saw it." The want of experience or knowledge of the particular wound in question would not affect the competency of the witness, if otherwise qualified, but might lessen the weight given to his testimony. In *People v. Thacker*, 108 Mich. 652-660 (66 N. W. 562), it was held that a practicing physician, a graduate of a college of medicine and surgery, and duly licensed to practice, could testify regarding a case of poisoning, although it did not appear that he had ever treated a person who had been poisoned or seen one treated by other physicians. The court therein quoted with approval from Rogers on Expert Testimony, page 45, as follows: "A witness, otherwise qualified, may express an opinion on a matter pertaining to his special calling or profession, although his knowledge of that particular matter has been derived from study rather than from actual experience. It is the doctrine of the courts that study of a matter without actual experience in regard to it may qualify a witness as an expert." And further, page 99: "The principle is well established that physicians and surgeons of practice and experience are experts in medicine and surgery, and that their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice." The witness in this case was regularly graduated in medicine and surgery, and was duly licensed to practice his profession in this state, and, being such, under the authorities above cited, he was competent to give his opinion on the matter in question by virtue of his general knowledge within the scope of his profession, although he had no experience or special knowledge of the wound in question.

7. The questions claimed by the defendant to have been leading could not have prejudiced him, for they all related to facts that were practically admitted on trial, except certain questions asked the son Robert and the daughter Olive. Considering the youth of these witnesses, one being 18 years of age, and the other 14, and the fact that they were testifying upon the trial

of their father for killing their mother, we think there was no error in permitting such questions, and that the case is fully within the rule in *State v. Ogden*, 39 Or. 195-202 (65 Pac. 449). The testimony of Robert and Olive Megorden to the effect that their mother did not pick up a stick in the beginning of the trouble was clearly rebuttal of the statement made by the defendant that his wife picked up a stick of stove wood when he first began to talk to her on the evening of the homicide, and that he was trying to get it from her when he was struck by his son Robert.

8. Certain principles, well established by this court, are applicable to the disposition of the questions raised upon the giving and refusal of instructions in this case: First, the instructions must be considered as a whole, and, when so considered, if they are substantially correct and could not have misled the jury to the prejudice of the defendant, the judgment will not be reversed because some instruction considered alone may be subject to criticism: *State v. Anderson*, 10 Or. 448; *State v. Hansen*, 25 Or. 391 (35 Pac. 976, 36 Pac. 296); *State v. Tarter*, 26 Or. 38, 43 (37 Pac. 53); *State v. Bartmess*, 33 Or. 110, 126 (54 Pac. 167); *State v. Gray*, 46 Or. 24 (79 Pac. 53); 1 Blashfield, Inst. to Juries, 902.

9. Second, the refusal to give instructions covered by the general charge is not error: *State v. McDaniel*, 39 Or. 161 (65 Pac. 520); *State v. Eggleston*, 45 Or. 346, 359 (77 Pac. 738); *State v. Gray*, 46 Or. 24 (79 Pac. 53); *State v. Smith*, 47 Or. 485, 487 (83 Pac. 865).

10. Third, timely and proper exceptions must be taken in the trial court and properly preserved in the record on appeal before error predicated upon instructions will be considered on appeal: Blashfield, Inst. to Juries, 795; *Kearney v. Snodgrass*, 12 Or. 311-317 (7 Pac. 309); *State v. Martin*, 47 Or. 282-288 (83 Pac. 849).

Error is assigned in the refusal to give 21 separate instructions requested by the defendant, but it is unnecessary to note each instruction refused, since most, if not all, of them applicable to the case were covered by the general charge.

11. The first instruction refused was as follows:

"The law presumes the defendant to be innocent of any offense, and this presumption follows him in the trial of this case until the contrary is shown beyond a reasonable doubt, and, in order to warrant a conviction of any or either of the offenses I have named, this presumption must be overcome by competent evidence which convinces you of his guilt to a moral certainty, and, if the evidence in this case does not satisfy you beyond a reasonable doubt of the defendant's guilt of murder in the first degree, it is your duty, under the oath you have taken, to acquit the defendant of the charge of murder in the first degree."

It is conceded that a portion of this instruction was covered by the following instruction given by the court, to which no exception was taken:

"The defendant in any case is presumed to be innocent until the contrary is proven. In case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted, and, in that case, your verdict should be 'Not guilty.'"

But it is claimed that this instruction did not go far enough, and that the court should have instructed the jury that the presumption of innocence continued until the jury reached a verdict. The instruction given was as broad in that respect as the one requested. The slight difference in the phraseology of the two instructions upon the presumption of innocence until the contrary is shown or proven beyond a reasonable doubt did not alter the meaning, which was the same in each. If any difference existed, it was in favor of the defendant in the last instruction given.

12. The question of "moral certainty" in the instruction refused, was fully covered by the following instruction given by the court:

"The law does not require demonstration, however; that is, it does not require such a degree of proof as, excluding the possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind. This is called satisfactory evidence, and it is the only evidence which will justify a verdict of guilty."

13. The question of reasonable doubt of guilt of murder in the first degree was also fully covered in the following instruction given by the court:

"If it should appear to you from all the evidence in this case beyond a reasonable doubt that the defendant has committed a crime which is included in the crime charged in the indictment, and there should still remain in your minds a reasonable doubt as to which degree he is guilty of, then, in that case, the defendant is entitled to the reasonable doubt as to the higher crime or to the highest degree, and you can only return a verdict of guilty of the degree of the crime so included in the indictment, as to which there is no reasonable doubt."

The instruction refused, being substantially covered by the general instructions of the court, there was no error in refusing it.

14. The court refused to give a requested instruction defining murder in the first and second degrees, and manslaughter by voluntary killing, and manslaughter by involuntary killing. In his general charge the court defined the different degrees of murder and also manslaughter by voluntary killing, and it is admitted the definitions were proper, but it is insisted that the court should have instructed, also, upon involuntary killing as defined by our statute:

"If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter": B. & C. Comp. § 1746.

In *Blashfield on Instructions to Juries*, page 440, it is stated: "Error cannot be predicated upon the omission or refusal of a trial judge to instruct as to the lesser grades of the offense charged, where there is no evidence to reduce the offense to a lesser grade." Mr. Justice MOORE has clearly and ably discussed this rule in *State v. Magers*, 35 Or. 520 (57 Pac. 197), and briefly and accurately summarized it on page 534 (page 201 of 57 Pac.) of the opinion in that case, as follows: "The rule is well settled that, on a trial of a person for the crime of murder, if there is no evidence tending to reduce the homicide to man-

slaughter, it is not incumbent upon the court to charge in reference to the lesser crime; but, if there is any evidence, direct or indirect, however slight it may be, that tends in any manner to show that the killing was done in the heat of passion, or under such circumstances as to eliminate the element of malice, prejudicial error is committed if the court fail or refuse to instruct the jury upon the law applicable to manslaughter."

Applying this rule to the case at bar, there was no error in refusing to instruct upon the involuntary killing, for there is no evidence in the case upon which to base such an instruction. There is no question as to how the homicide was committed, or the circumstances under which it was done, and the theory of the defense, as shown by the record and brief and arguments on appeal, that the defendant was so dazed by the blow given him on the head by his son when the latter struck him with the rifle, and so angered by his quarrel with his wife, that he killed her in a sudden heat of passion caused by a provocation sufficient to make the passion irresistible, does not tend in any way to reduce the offense to involuntary killing. If, as contended by counsel for defendant, the blow on defendant's head dazed and blinded him, and while so dazed and blinded, without knowing exactly what he did or why he did it, he secured a loaded revolver from a trunk in an adjoining room and pursued his son Robert with the pistol, and while so dazed and excited, in hot blood, upon the occasion, killed his wife, not realizing what he had done until the next day, such circumstances would not warrant the instruction refused upon involuntary killing. There is no element of involuntary killing, as defined in the instruction refused, in the evidence in this case, nor any circumstances from which it might be inferred. The evidence of the homicide and the manner in which it was done is not circumstantial, but the positive, direct testimony of the witnesses who saw it committed. There is nothing in the case that could possibly warrant any other instructions upon the grades of the offense than those given, of murder in the first and second degrees, and voluntary manslaughter.

15. The next instruction refused related to the definitions of deliberation and premeditation, and undertook to explain in connection therewith the law as to the time necessary for deliberation and premeditation. In the general charge the court defined deliberation and premeditation as given by this court in *State v. Ah Lee*, 8 Or. 214, and afterwards approved in *State v. Carver*, 22 Or. 602, 605 (30 Pac. 315), and instructed the jury in connection therewith:

"Deliberation and premeditation must be evidenced by some proof that the design was formed and matured in cool blood and not hastily upon the occasion. Unless the design to take life be formed and matured in cool blood and not hastily upon the occasion, there is not murder in the first degree. There is no definite space of time, however, fixed by law which must elapse between the formation of the intention to kill and the act of killing to constitute murder in the first degree. The question of time for the blood to cool is one of the facts for the jury to determine from the evidence adduced on the trial, which should satisfy the jury beyond a reasonable doubt."

This case is not like the case of *State v. Morey*, 25 Or. 241 (35 Pac. 655, 36 Pac. 573), where there was no evidence of any passion or excitement prior to the act of killing, and in which case the court said: "It cannot be said, as a matter of law, that any given space of time would afford an opportunity to a given person for deliberation and premeditation, if there is any question as to whether his mind was so disqualified or disturbed. In such case the question as to whether there had been sufficient cooling time, and whether the mind was in a condition to deliberate and premeditate, would be for the jury to determine and not the court." There being some evidence in the case at bar that the mind of the defendant had been disturbed shortly prior to the killing, the court very properly left the matter of time for deliberation and premeditation to be determined by the jury, in accordance with the rule declared in *State v. Morey*, 25 Or. 241, 246 (35 Pac. 655, 36 Pac. 573).

It is insisted that the fifteenth and seventeenth instructions refused were necessary to explain Section 1754, B. & C. Comp.,

and distinguish between murder in the first and second degree and manslaughter. These matters were sufficiently covered by the general charge, and particularly by 8, 24, 25, 26, 27, 28 and 31 of the instructions given. The eighteenth and nineteenth instructions refused were obscure and involved, and the criminal intent attempted to be described therein was sufficiently detailed in the twenty-ninth, thirtieth and thirty-first instructions given, while the twentieth, twenty-second, twenty-third and twenty-fourth instructions refused were covered by the eighteenth, nineteenth, twentieth and twenty-first instructions given.

16. The twenty-first instruction refused began by saying:

"The killing, however, which constitutes manslaughter must be either voluntarily committed in the commission of an unlawful act, or a lawful act without due action (caution?) or circumsppection."

It then proceeded to define a killing upon a sudden heat of passion, and to give the meaning the latter term. As the very first sentence of this instruction was inapplicable to the facts in this case as heretofore shown, the refusal of the entire instruction was proper: I Blashfield, Inst. to Juries, § 338.

17. The twenty-fifth and twenty-eighth instructions requested were cautionary, and it was within the discretion of the court to give them or not, so long as there was nothing in the circumstances of the case that made them necessary. The first related to the duty of the jury to keep their judgment in suspense until every fact was carefully examined, and its just weight and bearing faithfully determined, and the second cautioned the jury not to consider the feelings or desires of the community regarding the case in arriving at a verdict. There is nothing in the record to show want of care on the part of the jury, or that there was any feeling or desire for any particular verdict by the community, or any feeling whatever on the part of the community in regard to the result of the case. The homicide was committed almost six months prior to the trial, at a point some 20 miles distant from the place of the trial, and we see no necessity for giving the instructions requested, and it was not

error to refuse them: 1 Blashfield, Inst. to Juries, p. 760, § 344. The twenty-sixth and twenty-seventh instructions requested were covered by the forty-second and forty-first, respectively, of the instructions given.

18. The twenty-ninth instruction requested was to the effect that the evidence was not sufficient to prove murder in the first degree, in that it was insufficient to prove deliberation and premeditation. It is sufficient to say there was ample evidence upon these points to submit them to the jury as the court did under proper instructions. It is contended, however, that the evidence shows positively and conclusively that whatever design, purpose or intent the defendant had at the time he killed his wife was formed upon the occasion, in hot blood, under circumstances of extreme provocation, without any deliberation or premeditation. When it is recalled that the defendant, after being struck on the head with the rifle barrel by his son, went into an adjoining room, secured a revolver from a trunk there, and chased his son for 100 yards down the field firing three times at him, and then turned around and followed his wife for 300 yards to overtake her, and, as both the son and daughter say, raised his pistol and pointed it at her before shooting her, then deliberately walked away and went to the doctor to have the wound on his head examined, and told the doctor he had shot and "hit" or "hurt" his wife, it is readily seen that to have given the requested instruction would have been a direct violation of the law laid down by this court in *State v. Morey*, 25 Or. 241, 246 (35 Pac. 655, 36 Pac. 573), where it said: "As the power to deliberate or premeditate is possessed only by those having a mind free from passion or excitement, it cannot be said, as a matter of law, that any given space of time would afford an opportunity to a given person for deliberation or premeditation, if there is any question as to whether his mind was so disqualified or disturbed. In such case the question as to whether there had been sufficient cooling time, and whether the mind was in a condition to deliberate and premeditate, would be for the jury to determine and not the court."

It was, therefore, a question of fact for the jury to determine whether there was sufficient provocation to cause a sudden heat of passion, and also, if there had been such provocation and resulting passion, whether there had been sufficient cooling time, and whether his mind was in a condition to deliberate and premeditate, and these were questions which the court could not decide as matters of law under the evidence in this case. The instruction was, therefore, properly refused. This court in *State v. Carver*, 22 Or. 602, 604 (30 Pac. 316), speaking by Mr. Justice BEAN, present Chief Justice, said: "To raise the crime to the higher grade of murder in the first degree, there must be some proof that the act was committed of deliberate and premeditated malice. This proof need not be express or positive. It may be inferred from the circumstances." From the evidence in this case, there is no question that the defendant killed his wife, and, considering all the attendant circumstances connected therewith as disclosed by the record, the jury was justified in finding that he did so of deliberate and premeditated malice as charged in the indictment.

We have carefully considered the exceptions taken to the instructions given by the court, and all other assignments of error in this case, and, considering the instructions as a whole, we think they are substantially correct, and could not have misled the jury to the prejudice of the defendant, and that no substantial error was committed in the trial of the case. Fully realizing the serious consequences to the defendant of upholding the judgment against him, we are, nevertheless, compelled to declare that he had a full, fair and impartial trial under the laws of this state, in which his rights were fully protected by able counsel, and, there being no error, the judgment of the lower court is affirmed.

AFFIRMED.

, Argued 7 March, decided 16 April, 1907.

FISCHER v. CONE LUMBER COMPANY.

89 Pac. 737.

LOGS—EVIDENCE OF CONSENT TO SALE.

1. In this action, under B. & C. Comp. §5692, for damages for rendering difficult, uncertain or impossible of identification logs subject to laborers' liens, the evidence is insufficient to support a finding that the logs were sold and delivered with the knowledge and consent of all the lienholders.

LOGS—DURATION AND CONTINUITY OF LIEN.

2. Under a statute conferring a right to a lien for labor or materials, and requiring a notice of the intention to claim the lien, as, Sections 5677 and 5683, B. & C. Comp., relating to loggers' liens, and the statutes giving liens to laborers on buildings and in mines, the lien attaches at once upon the completion of the work and by law continues for a specified time, but beyond that period it can be continued only by filing the prescribed notice—unless the notice is filed the lien expires.

LOGGER'S LIEN—EFFECT OF DESTRUCTION OF LOGS.

3. The sawing into lumber of logs subject to a lien in favor of the persons who labored in preparing them for market does not affect the lien, since the subject-matter is not destroyed, but is only changed.

EFFECT OF ASSIGNING LOGGER'S LIEN ON RIGHT TO DAMAGES FOR RENDERING IDENTIFICATION DIFFICULT.

4. An assignment of a laborer's lien on logs carries with it the right to the remedy given by B. & C. Comp. §5692, providing that any person who shall injure or render difficult or impossible of identification logs upon which there is a lien, without the consent of the person entitled thereto, shall be liable to the lienholder for the damages to the amount of the lien, although the alleged injury was committed before the assignment, since such remedy is for an injury to the lien, and not for an injury to the right in the property.

APPEAL—DEFECTIVE STATEMENT OF CAUSE OF ACTION.

5. Where, in an action for damages for injury to the laborer's lien on saw logs, the complaint does not contain any distinct formal allegation that the lien notice was filed as required by statute, but set out a copy of the lien notice, which stated when the labor was performed and when rendition of services was closed, and that "thirty days have not elapsed since that time," the statement amounts to a defective statement of the facts recited, and, in the absence of a demurrer, is sufficient to sustain the complaint against an objection made for the first time on appeal.

DUTY TO MAKE FINDINGS IN LAW ACTIONS.

6. The findings in a law action tried by the court must cover all the material issues and they must be made by the trial judge; the supreme court cannot decide the proper deductions to be drawn from conflicting evidence.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. COMMISSIONER SLATER.

This is an action by W. G. Fischer against the G. W. Cone Lumber Co. for damages under the statute for rendering difficult, uncertain or impossible of identification 431 saw logs containing about 178,000 feet of lumber and 25 boom sticks, which it is alleged were subject to laborers' liens. The complaint contains 10 separate but similar causes of action, of which only the first will be noticed. Plaintiff sues as the assignee of Frank Miller and nine other lienholders who between March 12 and September 12, 1904, performed work upon and assisted defendant W. P. McIntire in cutting, hauling, preparing and rafting said logs in Columbia County. The logs were made capable of identification by means of certain marks put thereon when they were being cut. About September 12, 1904, McIntire sold the logs to the defendant the Cone Lumber Co., a corporation, which towed them on September 14 from near Rainier in Columbia County, to its sawmill near St. Johns, in Multnomah County, and, having commingled them with other logs, within three days thereafter sawed them into lumber, rendering their future identification difficult, uncertain or impossible. After stating the foregoing facts, plaintiff alleges that on September 15, 1904, Miller made, and on September 20 had recorded in the Record of Laborers' Liens in Columbia County, a notice of a laborer's lien in form substantially as required by Section 5683, B. & C. Comp.; a copy of which is set forth at length in the complaint.

McIntire defaulted, but the Cone Lumber Co. answered, denying the material allegations of the complaint, and also alleging, in effect, that shortly prior to September 12, 1904, McIntire had an agreement with plaintiff's assignors, whereby he (McIntire) was to sell the logs and collect the proceeds thereof in his own name, and pursuant thereto he did sell and deliver to it the said logs, and that it purchased them and removed them from near Rainier, Columbia County, with the knowledge and consent of each of said lien claimants; that at the time of the purchase it paid McIntire \$250. leaving due and unpaid \$686 95: that thereafter, and before the commencement of this action,

and before the filing of the liens, the said balance due McIntire was garnished by other creditors of McIntire. The reply denied the new matter of the answer. The cause was tried before the court without a jury, and, after taking testimony, findings were made to the effect that plaintiff's assignors had performed work upon said logs, and the several amounts due each of them from McIntire generally, as alleged, and that they had filed liens as alleged, but that they had waived their liens by consenting to the sale of the logs by McIntire to the company. Judgment was rendered dismissing the action.

Objection, however, was made by plaintiff to the second part of the sixth and to the twentieth findings, on the ground that there was no testimony to support either of said findings. That part of the sixth finding to which objection is made is to the effect that after September 14, 1904, the balance of the purchase price of the logs was attached by other creditors of McIntire. The twentieth finding is as follows:

"That defendant McIntire sold and delivered said logs to defendant G. W. Cone Lumber Co. with the knowledge and consent of all the claimants mentioned in the complaint as having assigned their claims to plaintiff; that defendant McIntire was authorized by all said claimants to sell and deliver said logs to defendant G. W. Cone Lumber Co. free from all claims; and before said sale it was agreed by and between defendant McIntire and all said claimants that defendant McIntire should sell said logs free from all claims, and collect the proceeds thereof, and from the proceeds thereof received by said McIntire for said logs he was to use a portion thereof to pay the camp bills, and the remainder distribute to said claimants upon said claims."

REVERSED.

For appellant there was a brief over the names of *Ralph Rolofson Duniway* and *W. C. Fischer*, with an oral argument by *Mr. Duniway*.

For respondent there was a brief over the names of *J. N. Percy, Gammons & Malarkey* and *Francis D. Chamberlain*, with oral arguments by *Mr. Percy* and *Mr. Chamberlain*.

MR. COMMISSIONER SLATER delivered the opinion.

As we view the matter, it is not necessary to determine the merits of plaintiff's objection to the sixth finding. The gist of this action is whether there was a lien upon the logs at the time they were taken and sawed up by the defendant company. If there was, and defendant injured, impaired or destroyed them or rendered their identification difficult, uncertain or impossible, without the express consent of the person entitled to such lien, it is liable in damages therefor to the lienholder to the amount of his lien, unless said lien was waived; and, if there was no such lien, it would not be liable. So, then, it is wholly immaterial whether or not the company was afterwards garnished by a creditor of the former owner of the logs.

1. Plaintiff's objection to the twentieth finding, which is set out in full in the statement of facts, is that there is no evidence to support it, and that it is broader than the allegations of the answer. The bill of exceptions purports to contain all the evidence upon which this finding is based. Briefly summarized, the testimony shows that McIntire had been in the habit of selling the logs produced by him and collecting and paying his laborers out of the proceeds. In this instance he says: "I calculated to collect the money and pay it over to the men." He came to Portland the next day after the sale of the raft for that purpose, and the laborers knew of his going and for what purpose he went. On being asked whether they consented to that, he says:

"I just came up the same as I always done ever since I have been down there, and collected the money, or either gave Fischer an order and he collected it, and came back and paid it."

And, again being asked what was the understanding between them, he answered:

"There was no understanding. Of course, I supposed they wanted their money as far as the raft would go. If there wasn't enough to pay them, they went back and made enough to pay them."

The laborers had also come to Portland, and were at the hotel expecting to receive their money; but this proves no more than

that the laborers knew that a previous sale had been made and were expecting to receive their pay either from McIntire or from the purchaser, for their is testimony in the record from which a conclusion might be drawn that they expected to collect from the company through the plaintiff as their agent. A consent to a sale cannot be inferred by their mere silence on being informed that a sale and delivery had been consummated: *Patterson v. Taylor*, 15 Fla. 336. There is no evidence tending to show that plaintiff's assignors at the time of or prior to the sale expressly or impliedly consented thereto, if, indeed, an assent with nothing more would be sufficient to waive their lien, but there must be coupled therewith an intent, express or implied, to waive the lien. In *Zorn v. Livesley*, 44 Or. 501 (75 Pac. 1057), where the same issue was involved concerning property subject to a chattel mortgage, Mr. Justice BEAN says: "There is no doubt that the sale of a chattel by the mortgagor with the consent of the mortgagee, and with the intent on his part to relinquish the lien, would convey a good title." There is no prohibition in the statute against a sale of the logs. McIntire might lawfully have sold the logs subject to the lien, and have collected any proceeds therefrom without any consent of the lienholders. Nor does it appear from the evidence that he undertook to sell the logs free and discharged of all liens, or that any of plaintiff's assignors so understood. In fact, it is not so alleged in the answer, and in that respect the twentieth finding is broader than the issue; and for that reason, if for no other, it must be set aside. But looking at this testimony in the most favorable light for respondent, and conceding, which we do not think is a fact, that it shows a consent on the part of the lienholders to a sale, it must have been only to the extent that said logs should be converted into cash from which they expected to be paid, and to that extent it would be only a conditional consent upon the breach of which condition by the defendant it would lose all right to allege such consent as a defense.

In *Jones v. Webster*, 48 Ala. 109, where a mortgagor was authorized by the terms of the mortgage to sell mortgaged prop-

erty by a broker of his own selection, provided he turned the proceeds over to the mortgagee, it was held that the mortgagee could bring trover against a broker who denied the mortgagee's right and refused to turn over the proceeds; and in *Oakes v. Moore*, 24 Me. 214 (41 Am. Dec. 379), where plaintiff had a lien amounting to a mortgage on logs and stood by and saw a sale made, the court say: "In this case it would seem that he witnessed the negotiation between their agent and Paine, and saw that it was an arrangement professedly made with a view to enable them to make payments to him; and doubtless expected to realize therefrom the whole amount due him. He accordingly seems to have waited till the termination of that contract, and, not finding his expectations realized, demanded and sought to regain possession of the logs. We do not see but he might well do so. He had not, in express terms, relinquished his right to the timber as secured by his contract; and, if he looked on, and saw the owners making arrangements to dispose of it, it cannot be doubted but that it was with an expectation raised by them that he should have the avails of it to the extent of his claim. They, having disappointed him in this expectation, should not be permitted now to say that he has relinquished his right to regain possession, nor to withhold from him the value of the timber to the extent of his first demand." Finding no evidence in the record to support this finding, a new trial of the case becomes necessary, because there is no finding upon the issues made by the pleadings as to whether defendant in sawing up the logs did so without the express consent of the lienholders.

2. In view of a new trial, it becomes necessary to pass upon a question suggested by defendant company in its brief, and insisted upon at the argument, that the complaint does not state a cause of action, for the alleged reason that plaintiff's right of action is based on an assignment of a lien which had ceased to exist on the destruction of the logs, and that in the place of the lost lien is given a right of action for damages to the person who was the lienholder at the time of the destruction of the logs, which right of action would not be carried by assignment of the

lien. It must be remembered that liens were not filed until several days after the logs were taken away and sawed up by the defendant. Section 5677, B. & C. Comp., provides, in effect, that every person performing labor upon or who shall assist in obtaining or securing saw logs, etc., shall have a lien thereon for the work and labor done; and Section 5683 provides that every person, within 30 days after the close of the rendition of the services or after the close of the work, claiming the benefit thereof, must file for record with the county clerk of the county in which such saw logs, etc., were cut, a verified claim, the form of which shall be substantially that set out in said section. Construing these sections together, as they must be, the laborer in the first instance has a lien for a specified time without the assertion of any formal claim therefor, but, if he intends to preserve and perpetuate his lien, it is incumbent upon him to file the notice required by Section 5683: *Hughes v. Lansing*, 34 Or. 118 (55 Pac. 95: 75 Am. St. Rep. 574); *Horn v. United States Min. Co.* 47 Or. 124 (81 Pac. 1009).

3. Defendant contends, however, that by sawing the logs into lumber the lien thereon which had existed by force of the statute was thereby destroyed. But this cannot be true, for the logs were not in fact destroyed. By the sawing their identity was doubtless rendered difficult, uncertain or impossible; but the subject-matter of the lien still existed.

4. But, says defendant, "the assignment to plaintiff does not purport to assign the right to an action for damages. It is limited solely to the lien filed, and does not refer to a claim for damages. The right to an action for damages, therefore, if any exist, remains in the assignors, and defendant's liability, if any, is to them, and not to appellant." The remedial right here undertaken to be enforced is purely statutory, being authorized by Section 5692, B. & C. Comp., which is as follows:

"Any person, firm or corporation who shall injure, impair or destroy, or who shall render difficult, uncertain or impossible of identification, any saw logs, upon which there is a lien, as herein provided, without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages

to the amount secured by his lien, which sum may be recovered by an action against such person, firm or corporation, without bringing the suit as provided for in Section 5687."

By the express provisions of this section the remedy is for an injury to the lien, which consists in having rendered it difficult or impossible for the lienholder to secure the benefit of a foreclosure of his lien as provided elsewhere in the statute, and is not for an injury to a right in the property, and likewise the remedy is given to the lienholder. For these reasons, it is an incident of the lien itself, and an assignment of the lien must necessarily carry with it the right to the remedy, although the alleged injury was committed before the assignment. "In the absence of any stipulation or provision in the contract of assignment concerning the securities or other incidents, an unqualified assignment of a chose in action carries with it, as an incident to the chose, all securities held by the assignor as collateral to the claim, and all rights incidental thereto. * * As the right to the chose and its incidents pass to the assignee thereof, so does the right to the remedies which the assignor had for the enforcement of the same": 4 Cyc. 69-71. Under this view of the law, the right of action for the injury to the lien was vested in the plaintiff by the assignment alleged.

5. Again, defendant urges that the complaint is fatally defective because it is claimed there is no allegation therein that the lien notice was filed within 30 days after the close of the rendition of the work, as required by Section 5683 of the statute, and which is admittedly a jurisdictional fact. The complaint does not contain any distinct formal allegation to that effect, but there is set out in the body thereof a copy of the lien notice which contains this statement:

"That said labor and assistance were so performed and rendered upon said property between the 12th day of March, 1904, and the 12th day of September, 1904, and the rendition of said services was closed on the 12th day of September, 1904, and thirty days have not elapsed since that time."

In the absence of a demurrer, the foregoing statement, being a part of the complaint, should at least be considered as amount-

ing to a defective statement of the facts therein recited and sufficient to sustain the complaint against an objection made here for the first time.

6. It is urged by appellant that judgment in his favor be directed, but the findings made and unchallenged will not support a judgment in favor of either party, for the reason that there is no finding upon the material issue as to whether or not the defendant sawed up the logs without the express consent of the lienholders, which is alleged by plaintiff and denied by defendant. That fact has not been determined, and it is the function of the trial court to do that. It is not within the province of this court to make findings in law actions upon disputed questions of fact: *Scott v. Ford*, 45 Or. 531 (78 Pac. 742, 80 Pac. 899; 68 L. R. A. 469). Moreover, assuming that it was necessary that a lien should be filed before this action could be maintained, it must have been filed within 30 days after the close of the rendition of the services, and, as this fact is averred in the complaint and denied by the answer, it is a material issue. But there is no finding determinative of that issue. As to Miller, the finding is:

"That between March 12, 1904, and September 12, 1904, Frank Miller performed labor and rendered services for defendant McIntire, * * for 131½ days, * * and (on) said September 20, 1904, said Miller filed in the office of the County Clerk of Columbia County the notice of lien," etc.

It cannot be ascertained from this finding as to when the services closed. They might have terminated more than 30 days prior to September 20, 1904, and still the finding be true.

For these reasons, the judgment should be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 10 Jan.; decided 19 Feb.; modified on rehearing 25 June, 1907.

NOON'S ESTATE.

88 Pac. 673, 90 Pac. 673.

EXECUTORS—LIMIT OF JURISDICTION OF PROBATE COURT IN PASSING ON PETITION OF EXECUTORS OR ADMINISTRATORS.

1. In passing on petitions of executors or administrators for authority to perform specified acts, probate courts have no jurisdiction to issue orders covering other matters, their jurisdiction being limited to granting or denying the prayers of the petitions.

DESCENT OF REAL PROPERTY—APPLICATION OF STATUTE AFFECTING VESTED RIGHTS—RIGHT OF EXECUTORS TO SELL.

2. The title to real property of a decedent vests in the heirs at once upon death, without any proceeding, subject only to be sold for purposes then provided by statute, and any deprivation or impairment of such vested right by subsequent legislation is void.

A testator who had devised real property to his wife and children died while B. & C. Comp. § 1172 was in force, providing that personal property of a decedent not specially bequeathed should be primarily liable for the payment of debts, etc. During the administration of his estate an act (Laws 1905, pp. 223, 224, § 3) was passed amending the section so as to authorize a sale of the real estate of a decedent for the payment of debts before disposing of the personalty, where the interests of the parties would be subserved thereby. *Held*, that the rights of the devisees could not be impaired by the law of 1905, and, if the testator left personalty not specially bequeathed, the court could not order a sale of the realty until the proceeds of a sale of the personalty were exhausted.

WILLS—SPECIFIC BEQUEST DEFINED.

3. A specific bequest is a testamentary gift of a part of testator's personalty so accurately described that it can be identified from all other things of its kind.

SPECIFIC BEQUEST—SUFFICIENT DESCRIPTION OF CORPORATION STOCK.

4. A description of corporate stock bequeathed is sufficiently definite to make the bequest specific if referred to as "my stock," and the identification of the certificate will carry the gift.

WILLS—INTENT—SPECIFIC BEQUEST.

5. Specific bequests are not favored, but the wish of the testator will be carried out where the intent is clearly expressed.

A bequest of "all the shares of the N. B. Co. standing in my name in said company at the time of my decease" is sufficiently definite and certain to make clear the testator's intent and require such stock to be considered a special bequest, under Section 1172, B. & C. Comp., and therefore exempt from liability for the payment of debts until a resort thereto shall be necessary by reason of a failure to pay debts from the proceeds of the sale of the remaining property not specifically devised or bequeathed.

CONSTRUCTION OF SPECIFIC BEQUEST—DIVIDENDS ON STOCK.

6. A special devise of corporate stock carries dividends accruing thereon, and such dividends stand on the same footing as the stock itself, with reference to unpaid debts.

From Multnomah: MELVIN C. GEORGE, Judge.

Statement by MR. JUSTICE MOORE.

This is an application by executors to devote money to the payment of debts of a decedent's estate, and involves the construction of a will. The facts are that W. C. Noon executed his last will and testament June 23, 1891, directing all his just debts and funeral expenses to be paid as soon as convenient after his death, bequeathing to his wife, Emily Noon, all their household furniture, books, musical instruments, etc., and devising to her for the term of her natural life their family residence in the City of Portland, with the remainder in the premises over equally to his children, W. C. Noon, Jr., Lulu A. Freeman, Viola E. Noon, Ralph A. Noon and Alma E. Noon, to whom he also devised and bequeathed the residue of his property of every kind, subject, however, to the dower estate of his wife therein, and also to whatever right the law would have given her in such property had no testamentary disposition thereof been made. The will further provided that the daughters, Lulu A. Freeman, Viola E. Noon and Alma E. Noon, should have and hold their shares of his estate for the terms of their natural lives only, with the remainders therein over to their heirs at law; and, moreover, stipulated that none of his children should receive his or her share of such property until attaining the age of 25 years. The testator executed a codicil to his will December 30, 1903, bequeathing equally to W. C. Noon, Jr., T. J. Armstrong and H. M. Cake all shares of the capital stock of the W. C. Noon Bag Co., a corporation, standing in his name at the time of his death, in trust, however, to hold the same for the term of 10 years, granting to them all power incident to the ownership of capital stock and authorizing them to vote such shares at all meetings called for the purpose of electing directors or otherwise, provided that no resolution should be adopted for the dissolution of the corporation, unless, in the opinion of such trustees, that determination should become necessary to prevent the loss of the assets of the company. The supplemental will further provides that the trustees shall continue the business of the

corporation for the term specified and distribute dividends arising therefrom semiannually among the testator's beneficiaries, to whom such shares of stock should be delivered on the termination of the trust. The trustees were also named in the codicil as executors without bonds. W. C. Noon died August 9, 1904, and, his will and codicil having been admitted to probate in Multnomah County, the executors named duly qualified for the performance of their trust. The testator at the time of his death was the owner of real and personal property as follows: In Multnomah County, appraised at \$47,260 and \$12,142.18, respectively, and in Columbia County at \$33,754 and \$10,493, respectively, and, in addition thereto, he also left the residence which was devised to the widow, estimated at \$15,000, and the furniture, etc., given to her, worth \$920, besides 1,149 shares of the capital stock of the W. C. Noon Bag Co., of the face value of \$114,900, making the total assets of the estate \$234,469.18. The petition initiating the controversy herein was filed by the executors W. C. Noon, Jr., and H. M. Cake, and shows that claims against the decedent's estate had been allowed, amounting to \$59,588.49, of which sum \$34,500 was due the W. C. Noon Bag Co.; that, another claim of \$4,500 having been disallowed, an action thereon had been instituted and was then pending; that prior to the filing of this petition the executors last named secured an order of the county court directing the sale of certain real property owned by the estate, but that no disposal thereof had been effected; that the board of directors of the W. C. Noon Bag Co. declared a dividend of \$26,427 on the 1,149 shares of stock held by the trustees, and also adopted a resolution postponing the time of payment of the corporation's claim of \$34,500 against the decedent's estate; that the dividend so announced is sufficient to pay all such debts, except the demand of the W. C. Noon Bag Co., the claim so rejected, and the allowance made for the support of the widow and her minor children. The prayer of the petition is that the claims mentioned as being due might be paid from the sum of money so on hand. \

The executor Armstrong filed a remonstrance against such application of the dividend, on the ground that the resolution of the board of directors of the corporation, purporting to waive its right to the immediate payment of its claim, was not regularly adopted. Viola E. Noon and the widow, Emily Noon, for herself as legatee and devisee, and also as guardian of the persons and estates of Ralph A. Noon and Alma E. Noon, minor children of the testator, filed a remonstrance against the proposed application of such dividend, on the ground that the testamentary disposition of the shares of stock of the W. C. Noon Bag Co., for the term specified, with direction to the trustees to carry on the business of the corporation and to divide the proceeds arising therefrom semiannually among the testator's heirs at law, created a specific bequest of the stock and of the profits arising therefrom, which exonerated the stock and dividends from liability on account of the debts of the decedent's estate, until the property thereof not specially devised or bequeathed had been disposed of in discharging the claims and the expense of administration. The prayer of such remonstrance is that the request of the petitioners be denied, and that the executors be directed to sell the real and personal property liable for the payment of the debts of the estate, and from the money arising therefrom to discharge such claims and to pay the expenses of the administration. Lulu A. Werner, formerly Lula A. Freeman, and Stewart Freeman, her son, a minor, by his guardian *ad litem*, also filed a remonstrance against such application of the dividend on the same grounds, and prayed for the same relief as last hereinbefore mentioned.

Based on the petition and remonstrances, the county court made findings of fact and ordered that the dividend so declared should be exonerated from liability for the debts of the estate, and that the sum of \$26,427, the profits on the stock of the W. C. Noon Bag Co., so announced, be distributed to the heirs at law named in the will, according to the provisions thereof and of the codicil, and directed the executors to comply with a former order respecting the sale of the real property therein des-

ignated, to dispose of the personal property of the estate not specially bequeathed, and to apply the proceeds thereof to the payment of the debts. Noon and Cake appealed from such order to the circuit court for Multnomah County, which affirmed the action of the county court. Thereafter the application of Cake to be discharged as an executor having been allowed, Noon and Armstrong separately appealed from the decree last rendered to this court.

AFFIRMED.

For appellant Noon there was a brief over the name of *Cake & Cake*, with an oral argument on rehearing by *Mr. William M. Cake*.

For appellant Armstrong there was a brief over the name of *Wilson & Neal*, with an oral argument on rehearing by *Mr. Oscar Almamen Neal*.

For respondents there was a brief over the names of *Bauer & Greene* and *Hogue & Wilbur*, with an oral argument on rehearing by *Mr. Thomas Gabbert Greene*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is doubted whether or not that part of the decree requiring the executors to comply with the terms of a prior order of the county court directing a sale of real property to pay the claims against the decedent's estate is before us for consideration. It will be remembered that the executors Noon and Cake petitioned for an order authorizing them to apply the sum of \$26,427 in payment of certain claims which had been allowed. An exercise of the power thus invoked was necessarily limited to the granting or denying of the prayer of the petition. A reiteration of the prior command to sell the land to pay the debts of the estate, when personal property not specially bequeathed was available, in part at least, for that purpose, could not give additional force to the original order, directing a sale of the real property.

2. The statute in force when the testator died made the personal property of a decedent's estate not specially bequeathed primarily liable for the payment of all debts against it and of

the expenses of administration thereon. If the proceeds of the sale of such property were insufficient for that purpose, the real estate might be sold to pay the claims that had been admitted, etc.: B. & C. Comp. § 1172. The section referred to was amended, after the death of the testator, so as to authorize a sale of the real property of a decedent's estate for the purposes mentioned, before disposing of the personal property, whenever it was made to appear to the county court or judge thereof that the best interests of all parties concerned therein would be subserved thereby: Laws 1905, p. 233. The original order of the county court, directing a sale of the real property of the estate before exhausting the personal property for the payment of the debts, was based on the amended statute of which Section 3 thereof is as follows:

"This act shall take effect and apply to any and all estates of decedents now unsettled and in course of administration as well as those hereafter probated": Laws 1905, pp. 233, 234.

In *State v. O'Day*, 41 Or. 495 (69 Pac. 542), Mr. Justice BEAN, in speaking of means whereby the owner of land has the just possession thereof, says: "The title to real property descends to the lawful heirs immediately upon the death of the ancestor." At common law the real property of which a person died seised descended directly to his heir or devisee: 11 Am. & Eng. Enc. Law (2 ed.), 1035; *Clark v. Bundy*, 29 Or. 190 (44 Pac. 282). The widow and children of W. C. Noon on August 9, 1904, when he died, became seised of the real property devised to them, and their rights therein could not be defeated or impaired by subsequent legislation attempting to subject their land to a liability not imposed thereon when they became invested with the legal title thereto: *Brenham v. Story*, 39 Cal. 179; *Estate of Packer*, 125 Cal. 396 (58 Pac. 59; 73 Am. St. Rep. 58); *In re Newlove's Estate*, 142 Cal. 377 (75 Pac. 1083). The authority of a county court to order the sale of real property of a decedent's estate is not general, but limited, is derived from the statute conferring the right, and can be exercised only in the manner prescribed: *Haynes v. Meeks*, 20 Cal.

288. As the deceased left personal property not specially bequeathed which was primarily liable for the payment of his debts, the county court was powerless to order a sale of the real estate until the proceeds of the sale of the former class of property was exhausted. We conclude that the order directing the sale of any part of the real property was void; but, as the direction was not obeyed by the executors, no injury will result therefrom.

It is insisted that no citation was served on the minor heirs as required by law (B. & C. Comp. § 1168), without which jurisdiction of their persons was not secured, and that their general guardian and guardian *ad litem* were powerless to waive such service and could not enter a general appearance for them. We do not consider it necessary to discuss this question, for any doubt on the subject can be resolved when proper application is made by the executors to the county court to sell the real property of the decedent's estate, after disposing of the personal property not specially bequeathed, by strictly pursuing the mode prescribed in the statute as a means of securing such jurisdiction.

3. Considering the case made by the petition and remonstrances, the question is whether or not the testator's disposal of the shares of stock of the W. C. Noon Bag Co., with direction to the trustees to continue the business of the corporation and equally to distribute the profits arising from such operation semiannually to the legatees and devisees named, created a specific bequest, thereby exonerating the shares of stock and the dividends that might be declared thereon from the payment of the debts of the decedent's estate until the other assets thereof had been applied in discharging such claims and the costs and expenses of the administration. The statute exempting particular property of a decedent's estate from primary liability for the debts thereof provides in effect that, if any article of personal property has been specially bequeathed, it is exonerated from the operation of the order of sale until resort thereto becomes necessary by reason of a deficiency in the payment of claims from the proceeds of the sale of other property: B. & C.

Comp. § 1171. A specific bequest is a testamentary gift of a part of the donor's personal property which corporal object or chose in action is so accurately described that it can be identified from all other things of its kind: 1 Roper, Legacies, *191; 18 Am. & Eng. Enc. Law (2 ed.), 714; *Johnson v. Goss*, 128 Mass 433; *In re Estate of Woodworth*, 31 Cal. 595.

4. The identity of a certificate which is issued to evidence money or property put into a fund by a person who, by subscription or otherwise, becomes a member of a corporate body, is sufficient to make a bequest thereof specific when a testator in his will describes it as "my stock" or "stock standing in my name", for by the use of the words quoted the donor's intent to give the particular property mentioned is disclosed: 18 Am. & Eng. Enc. Law (2 ed.), 718; 2 Beach, Mod. Eq. Jur. § 1043; *Sibley v. Perry*, 7 Ves. Jr. 522; *Brainerd v. Cowdrey*, 16 Conn. 1. To the same effect, see, also, the notes to the case of *Ashburner v. Macquire*, 2 White & Tudor's Leading Cases in Equity, *267.

5. Specific bequests are not favored, and, unless the will clearly discloses the testator's intent to give the thing mentioned, the donation will not be considered of that class: 18 Am. & Eng. Enc. Law (2 ed.), 715. In assigning a reason for this legal principle, Mr. Justice SAWYER says: "Courts have always leaned strongly against construing a legacy as specific when there is any doubt, and such a rule of construction is usually far more favorable to the legatee; for a specific legacy is liable to be adeemed, and therefore entirely lost": *In re Estate of Woodworth*, 31 Cal. 595.

6. We think there can be no doubt that it was the testator's intention to vest the trustees named with the title to the stock mentioned, and, as the description thereof is particular enough to identify the subject-matter of the testamentary gift, the bequest is specific, and hence the corpus of the shares of stock is exonerated from liability on account of the debts of the decedent's estate until a resort thereto becomes necessary by reason of a failure to discharge such obligations from the proceeds of

the sales of the remaining property not specifically devised or bequeathed.

The conclusion reached in regard to the shares of stock also applies to the profits accruing from conducting the business of the corporation.

AFFIRMED.

Decided 25 June, 1907.

ON REHEARING.

MR. JUSTICE MOORE delivered the opinion.

This cause was originally submitted on briefs; but, after the opinion was announced, counsel for the various parties were, by order of the court, permitted orally to argue their respective theories. An examination of the legal principles vocally discussed satisfies us that the former opinion should be amended by striking out the whole thereof, commencing with the sentence, "The remaining question," etc., and inserting in the official copy the following paragraph: "The conclusion reached in regard to the shares of stock also applies to the profits accruing from conducting the business of the corporation."

The decree appealed from will therefore be affirmed.

AFFIRMED.

Argued 12 April, decided 23 April, 1907.

STATE v. McELRATH.

89 Pac. 803.

CONSTITUTION—COUNTY JUDGE AND COMMISSIONERS.

1. Under Const. Or. Art. VII, § 11, providing for a county judge, and Section 12, authorizing the election of two commissioners to assist the judge in county matters, the judge alone is the county court as much as though one of or both the commissioners were sitting with him.

COUNTY COURT—NATURE OF JURISDICTION IN LOCAL OPTION MATTERS.

2. In the performance of the duty imposed upon it by the local option law, the county court acts in a special capacity under Const. Or. Art. VII, § 12, giving it jurisdiction pertaining to "such other powers and duties * * as may be prescribed by law."

SAME.

3. It is immaterial whether the duties imposed by the local option law be discharged by the county court when presided over by the county judge alone, or when the county commissioners are sitting with him, since in either case the action is that of the county court.

COUNTY COURT RECORDS—DOCKETS AND JOURNALS—DIRECTORY STATUTE.

4. B. & C. Comp. § 921, providing that the business of the county court shall be docketed and disposed of in a certain order, and shall be entered and kept in separate books, is only directory, and an order or judgment of the court in a local option matter entered in any of its books of record is valid.

From Umatilla: WILLIAM SMITH, Judge.

James MacElrath was convicted of selling intoxicating liquors contrary to the provisions of the local option law, and appeals. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587; 600.

AFFIRMED.

For appellant there was a brief over the name of *Winter & Collier*.

For the State there was a brief over the names of G. W. Phelps, District Attorney, and John McCourt.

Opinion by MR. CHIEF JUSTICE BEAN.

The local option law provides that, whenever a petition therefor signed by the requisite number of voters shall be filed with the county clerk, "the county court" shall order an election to be held at the time and place mentioned in such petition to determine whether the sale of intoxicating liquors shall be prohibited in the designated county, subdivision or precinct, and that on the eleventh day after such election, or as soon thereafter as practical, "the county court" shall hold a special session and declare the result: Laws 1905, pp. 41, 47, c. 2.

1. The single question on this appeal is whether the orders referred to may be made by the county court presided over by the county judge alone, or whether they must be made by the county judge and commissioners sitting as a court for the transaction of county business. This is the first time the question has been directly presented for decision, although it has been assumed in previous cases that orders made by the county court sitting for the transaction of county business were valid: *Marsden v. Harlocker*, 48 Or. 90 (85 Pac. 328); *State ex rel. v. Rhodes*, 48 Or. 133 (85 Pac. 332); *State ex rel. v. Malheur County Court*, 46 Or. 519 (81 Pac. 368); *State ex rel. v. Rich-*

ardson, 48 Or. 309 (85 Pac. 225). The county court is a judicial tribunal created by the constitution (Art. VII, § 1), and has "the jurisdiction pertaining to probate courts and boards of county commissioners," a limited civil and criminal jurisdiction, "and such other powers and duties * * as may be prescribed by law": Section 12. It is held by the county judge (Section 11), but the legislature may provide for the election of two commissioners to sit with the judge while transacting county business: Section 12.

Prior to the adoption of the constitution the probate business and that of the counties was transacted by separate tribunals—one the probate court, and the other the board of county commissioners (Laws 1854-55, pp. 338, 412)—but both of these were abolished by the constitution and the duties of each conferred upon the county court. In pursuance of the authority vested in it, the legislature has provided for the election of two commissioners (Section 2533, B. & C. Comp.) to sit with the judge while county business is being transacted: Section 909. It has also declared that county business shall consist in providing for the erection and repair of courthouses, jails and public buildings; providing offices and furniture, etc., for county officers; establishing, vacating and altering county roads and the erection and repair of public bridges thereon; licensing ferries and granting all other licenses provided by law, where the authority is not expressly given to some other tribunal; levying taxes and providing for the maintenance and employment of paupers; compounding for and releasing in whole or in part any debt or damages due the county; and the general care and management of the county property, funds and business where the law does not otherwise expressly provide: Section 912, B. & C. Comp.

It will thus be seen that, while the business has been subdivided and classified, there is but one court provided by the constitution and laws. In the transaction of all matters properly coming before it, except county business or such as is specially imposed on the court sitting for the transaction of county

business, the county judge sits alone. When county business is being considered, the two commissioners sit with him and are a part of the court, but the judge and commissioners do not constitute a separate tribunal. They are still the county court charged by the statute with the performance of certain specified duties: *Pacific Bridge Co. v. Clackamas County* (C. C.), 45 Fed. 217.

2. In ordering an election under the local option law, and in declaring the result of such an election, the county court is not exercising any of its ordinary duties. It is not transacting probate business, because that contemplates matters dealing with the settlement of the estates of deceased persons. It is not exercising criminal or civil jurisdiction, because that assumes adverse parties and the determination of issues between them. It is not transacting county business, because the duties imposed upon it do not come within the provision of the statute defining what shall constitute county business. The county, as such, has no interest in the question whether an election under the local option law shall be held, nor is it affected in any way by the result. In the performance of the duty imposed upon it by the local option law the county court is acting in a special capacity and in the discharge of "other powers and duties prescribed by law": *State ex rel. v. Malheur County Court*, 46 Or. 519 (81 Pac. 368); *State ex rel. v. Richardson*, 48 Or. 309 (85 Pac. 225).

3. And it is of no importance, so far as we can see, whether the duties thus imposed, which are largely, if not entirely, ministerial, be discharged by the county court when presided over by the county judge alone, or when the county commissioners are sitting with him. In either event, it is the act of the county court and a compliance with the letter and spirit of the local option law.

4. It is true the statute provides that the business of the county court shall be docketed and disposed of in a certain order, and shall be entered and kept in separate books: Section 921, B. & C. Comp. It is doubtful whether the duties imposed by

the local option law come within any of the classifications so named. But, however that may be, the provision that the business of the several classifications shall be entered and kept in separate books is only directory, and an order or judgment of the court entered in any of its books of record is nevertheless valid: *Sprigg v. Stump* (C. C.), 8 Fed. 207.

We conclude, therefore, that the order of the county court in the case at bar was valid, although it was made while the court was presided over by the county judge alone.

The judgment is affirmed.

AFFIRMED.

Argued 26 March, decided 23 April, 1907.

NICHOLS v. SALEM.

89 Pac. 804.

MUNICIPAL CORPORATIONS—GOVERNMENTAL POWERS—CONSTRUCTION OF CHARTER—CONTROL OVER VAGRANCY.

1. Under a provision of a city charter investing the common council with the exclusive power to define what shall constitute vagrancy, and to provide for the support, punishment and employment of vagrants and paupers, the common council has power, not only to declare what shall constitute vagrancy, but also to provide for the punishment of persons guilty thereof, the power to punish being coextensive with the power to define.

EVIDENCE OF EXISTENCE OF CITY CHARTER.

2. The certificate of the city recorder, attached to his return to a writ of review in a criminal case tried before him, that he had not annexed a copy of a certain ordinance because he could not find the original thereof in his office, is not sufficient to overcome the presumption that such ordinance was in existence when the case was tried in the recorder's court.

SUFFICIENT PLEA OF AN ORDINANCE IN A MUNICIPAL COURT.

3. In a prosecution for the violation of a municipal ordinance, it is sufficient to refer in the complaint to the ordinance by title, number and date of approval, and it is not necessary to set out the ordinance in full or according to its legal effect, though the court does not pass on the question of the necessity of pleading the ordinance at all.

From Marion: ROBERT GALLOWAY, Judge.

E. E. Nichols was convicted of vagrancy, etc., in the Municipal Court of the City of Salem. From a judgment of the circuit court affirming a judgment of the municipal court, he appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Webster Holmes*, with a brief over the names of *W. H. Holmes* and *Webster Holmes*, to this effect.

I. The charter of the City of Salem, as it stood at the time of the alleged passage of the alleged Ordinance No. 223, only gave the city power to define what should constitute vagrancy, and did not give power to make the crime of vagrancy punishable, so that any attempt by the city to do so is *ultra vires*. *Laws 1891, p. 1091, § 6, subd. 28.*

II. The city must have had in existence the ordinance under which they attempted to try and convict, in such form as could have been introduced in evidence; and that must have been in the form of the original thereof or of some authorized compilation of the ordinances of said city, and simply a purported copy in the alleged record of ordinances would be insufficient; and the return of the recorder to said writ of review shows that the recorder had no such original in his possession or custody, and said return fails to show that there was any authorized compilation of ordinances of said city: *B. & C. Comp. § 755, subd. 5.*

III. The amended complaint does not sufficiently plead the alleged ordinance for the reason that it fails to set forth the provisions of the ordinance or that part thereof claimed to have been violated by appellant *in haec verba*, or pleading the legal effect thereof, which is required in matters of criminal or penal nature: *Fink v. Milwaukee*, 17 Wis. 26; *Woods v. Prineville*, 19 Or. 108, 110 (23 Pac. 880).

For respondent there was an oral argument by *Mr. A. O. Condit*, with a brief to this effect.

1. The charter of Salem, as it stood when Ordinance No. 223 was passed, gave the city authority

“To define what shall constitute vagrancy, and to provide for the support, restraint, punishment, working and employment of vagrants and paupers”;

And further power

“To make by-laws and ordinances not inconsistent with the laws of the United States or of this state to carry into effect the

provisions of this charter, and to provide for the punishment of persons violating city ordinances by fine or imprisonment or both": Laws 1891, p. 1091, § 6, subds. 27, 28.

Ordinance 223 of the City of Salem clearly defines vagrancy by setting out the acts the doing of which constitutes the offender a vagrant, and provides a punishment therefor, which is sufficient without declaring such acts unlawful in terms: *Portland v. Yick*, 44 Or. 439, 446 (102 Am. St. Rep. 633: 75 Pac. 706).

2. A book in which all the ordinances of the town are recorded, kept in its custody, is sufficient proof of the existence of an ordinance contained therein: 17 Am. & Eng. Enc. Law (1 ed.), 267; *Burnes v. Alexander City*, 89 Ala. —.

3. It is not necessary to plead an ordinance in a criminal proceeding in a municipal court, since such courts will take judicial notice of the ordinance of the municipality in like manner and for like purposes as the courts of the state take judicial cognizance of the public statutes of the state, and, in the event of an appeal to the circuit court, although by the rules of law the case is to be tried *de novo*, the circuit court will take like judicial notice of such ordinances as the municipal courts: *Portland v. Yick*, 44 Or. 439, 445 (102 Am. St. Rep. 633: 75 Pac. 706); *Ex parte Davis*, 115 Cal. 446; *Conboy v. Iowa City*, 2 Iowa, 95; *State v. Leiber*, 11 Iowa, 409; *La Porte City v. Goodfellow*, 47 Iowa, 573; *West v. Columbus*, 20 Kan, 635; *Solomon v. Hughes*, 24 Kan. 212; *Downing v. Miltonvale*, 36 Kan. 741; *Wheeling v. Black*, 25 W. Va. 281; *Moundsville v. Velton*, 35 W. Va. 218; *Anderson v. O'Donnell*, 29 S. Car. 355 (1 L. R. A. 632: 13 Am. St. Rep. 728); 15 Enc. Pl. & Pr. 425; 1 Dillon, Munic. Corp. (4 ed.), § 413.

4. In those cases where it is necessary to set out the ordinance in the pleadings it is sufficient to refer to such ordinance by its title and the date of its approval, whereupon the court will take judicial notice thereof: B. & C. Comp. § 90; 15 Enc. Pl. & Pr. 426; *Nodine v. City of Union*, 13 Or. 587 (11 Pac. 298); *Woods v. Prineville*, 19 Or. 108, 110 (23 Pac. 880); *Amestoy v. Electric Rapid Transit Co.* 95 Cal. 315.

MR. CHIEF JUSTICE BEAN delivered the opinion.

On February 6, 1905, the plaintiff was tried and convicted in the Municipal Court of the City of Salem on a complaint charging him with the crime of vagrancy, committed by unlawfully and wrongfully frequenting and living in a house of ill fame, and being without visible means of living, and without lawful occupation and employment, "contrary to the provisions of Section 1 of Ordinance 223, entitled:

"An Ordinance to define and punish vagrancy, approved by the mayor of the said city on the 15th day of September, 1891."

He thereafter sued out a writ of review to have the judgment of the municipal court annulled and set aside on the grounds (1) that the ordinance under which he was tried and convicted was void, because not within the power of the city to enact; (2) that there was not sufficient proof of the existence of such an ordinance; and (3) that the complaint was insufficient because it did not set out the ordinance alleged to have been violated *in haec verba* or in legal effect, but only referred to it by title, number and date of approval. The judgment of the municipal court was affirmed, and he appeals.

By the charter of the City of Salem the common council is given the exclusive power

"To define what shall constitute vagrancy, and to provide for the support, restraint, punishment, working and employment of vagrants and paupers": Laws 1891, p. 1091.

The ordinance under which plaintiff was prosecuted is entitled and provides as follows:

"An Ordinance to Define and Punish Vagrancy."

"Section 1. Any person or persons who live idly or live without any settled homes, or who have no visible means of living or lawful occupation or employment, or are found begging or living in tippling houses, opium smoking houses, bawdy houses, houses of ill fame, or who shall frequent tippling houses, bawdy houses, houses of ill fame, opium smoking houses, or houses wherein opium is smoked, or houses generally reputed or of common report to be bawdy houses or houses of ill fame, is hereby defined to be a vagrant.

Sec. 2. Any person or persons convicted of being a vagrant, as defined in the foregoing section, shall be fined not less than \$5. nor more than \$100, or be imprisoned in the city jail not less than five days, nor more than twenty days."

1. The position of the plaintiff, as we understand it, is that while the city may, under its charter, define vagrancy, it has no power to provide for the punishment of the crime so defined, the authority to punish being confined solely to common-law vagrancy. The charter is the organic law of the city, and was designed to confer upon the inhabitants of the given locality certain police powers and duties. It should, therefore, receive a reasonable construction to effect the purposes intended. When so construed, it is apparent that the charter was intended to, and did, confer upon the common council the power to declare what shall constitute vagrancy, and to provide for the punishment of persons guilty thereof. Vagrancy is the state of being a vagrant. The power to define vagrancy is simply the power to declare what shall constitute a vagrant, and express authority is given by the charter to provide for the punishment of vagrants. When, therefore, the city, by ordinances, declared that any person living idly or without any settled home, or without any visible means of living, or lawful occupation and employment, or found begging, or living in or frequenting certain disreputable houses, shall be deemed a vagrant, and punished in a certain manner, it in effect defined vagrancy and provided for its punishment.

2. It is next contended that there was no such ordinance at the time of plaintiff's trial and conviction. There is nothing in the record upon this subject except the certificate of the city recorder, annexed to his return to the writ of review, stating that in June, 1905, he was unable to find among the records of his office the original of such ordinance. This is no evidence that the ordinance was not in existence at the time of plaintiff's trial and conviction some months prior to the date of the recorder's certificate, and we are bound in this proceeding to assume such to have been the fact.

3. It is further contended that the complaint upon which

plaintiff was tried and convicted is insufficient because it does not set out the ordinance which he was charged with violating, either in full or in legal effect. There seems to be some conflict in the authorities as to whether it is necessary to plead a municipal ordinance in a municipal court, since such court will take judicial notice of ordinances on the ground that they are the law of the forum: 15 Enc. Pl. & Pr. 425; *Portland v. Yick*, 44 Or. 439 (75 Pac. 706; 102 Am. St. Rep. 633). But, whatever the true rule may be on the subject, it is sufficient in proceedings in a municipal court to refer in the pleadings to an ordinance by title, number and date of approval, as was done in this case: *Nodine v. City of Union*, 13 Or. 587 (11 Pac. 298); 15 Enc. Pl. & Pr. 426.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

Argued 26 March, decided 23 April, 1907.

AYERS v. LUND.

89 Pac. 806.

DISCRETION IN VACATING FINAL ORDERS DURING TERM.

1. During the term at which a judgment or decree is rendered the judge has discretionary power to set it aside and allow the hearing of further testimony and to modify it if appropriate.

CURATIVE STATUTE—RETROACTIVE EFFECT—TAXATION—LEVY.

2. Under the rule that the legislature may subsequently cure such omissions or irregularities in the proceedings of public officers as might have been originally dispensed with, it is competent to enact that sales for taxes theretofore made shall be valid, notwithstanding the required levy was not made as required by statute.

By Hill's Ann. Laws 1892, §§ 2814, 2816, the sheriff was required, under his warrant, when resort was had to real estate for the collection of taxes, to levy on the property before advertising it for sale. Section 3135 of B. & C. Comp., enacted afterwards, provides that sales of land for taxes theretofore or thereafter made to counties shall be valid notwithstanding the omission of the sheriff to make a levy. *Held*, that a sale made before the passage of the latter act without a levy by the sheriff was validated by the passage of such act, since it was an omission in the proceedings of a public officer which it was competent for the legislature to cure by retroactive enactment.

TAX DEEDS—BURDEN OF PROOF TO MAINTAIN.

3. Unless otherwise specially provided, the claimant under a tax deed has the burden of proof as to its validity.

TAXATION—SALES TO COUNTY—EFFECT OF DEED.

4. Section 3127, B. & C. Comp., which provides that where real property shall be sold to a private purchaser at a tax sale, the sheriff's deed shall be *prima facie* evidence that the statutory requirements have been fully complied with, does not apply to sales to counties, as no deeds are required in such cases.

EFFECT OF RECITALS IN TAX DEEDS AS EVIDENCE.

5. The provisions of Section 3135, B. & C. Comp., that deeds given by the sheriff at sales of real property shall be conclusive evidence of the regularity and existence of all proceedings to pass title, etc., apply only to the regularity and existence of such proceedings as are the foundation of the deed, and do not operate as evidence of the regularity and existence of the proceedings necessary to transfer the tax debtor's title to the county.

TAXATION—SUFFICIENCY OF RETURN OF SALE.

6. A return of the officer making a tax sale, consisting of a printed notice of the tax sale cut from a newspaper, headed, "Sheriff's Sale for Delinquent Taxes," which was attached to the delinquent tax roll and upon which was interlined or written at the time of or after the sale, opposite the name and description of the property, the name of the purchaser and the selling price in each case, to which was attached this certificate: "The foregoing return of delinquent tax sales for the year 1898 is true and correct in every detail. Dated the 27th of October, 1899"—is not in compliance with B. & C. Comp. §§ 3118, 245, 1014, providing that the warrant for the collection of delinquent taxes must be executed and returned as an execution against property, and that a sheriff must make written return of an execution setting forth his doings thereon.

TAXATION—ADVERTISEMENT AND RETURN OF SALE—NOTICE.

7. A due return showing the advertisement of delinquent property and the sale are essential elements in proceedings to sell land for taxes, and without them there is no evidence of title in the county, since their absence cannot be cured by the legislature, for then there would not be notice.

From Josephine: HIERO K. HANNA, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit to quiet title brought by S. N. Ayers and others against O. O. Lund. Elizabeth Ayers, through whom the plaintiffs claim, was the owner of the property in question during the year 1898, and it was assessed to her for taxation for that year. The answer as a defense alleges that, the tax thereon being delinquent, the sheriff on October 23, 1899, sold the same to Josephine County by authority of the delinquent tax warrant for the amount of said taxes, \$8.35, and thereafter, on July 14, 1902, sold to defendant the title thus acquired by the county for the sum of \$16.35, pursuant to the terms of Sections 3133,

3136, B. & C. Comp., and on August 8, 1902, executed to him a deed therefor under the provisions of Section 3135. Plaintiffs by their reply question the validity of defendant's title, for the reason that the sheriff in making said tax sale to the county made no levy on the property under his warrant, and did not advertise the same for sale, as provided by law, and made no return of said sale upon his tax warrant, and alleges tender of \$50 to the defendant prior to the suit to cover the amount of his bid and subsequent taxes paid, and that they tender the same into court with the reply. At the trial no proof was offered of the tender or deposit of the tender with the clerk, and for want thereof findings were made and decree rendered by the court in favor of defendant. On the same day the plaintiffs filed a motion, based upon affidavit, to vacate the decree and reopen the case and permit them to prove the tender and to deposit the money in court, which was granted by the court, and thereafter, upon the further findings, decree was rendered for plaintiffs. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

AFFIRMED.

For appellant there was a brief over the name of *Mr. H. D. Norton*.

For respondent there was a brief over the name of *Robert Glenn Smith*.

Opinion by MR. JUSTICE EAKIN.

1. Defendant assigns as error the act of the court in vacating the decree and permitting further testimony to be offered. The proceedings of the court remain in the breast of the judge until the close of the term, during which time the court has inherent right to correct, modify or vacate its decree, and its action in such a case will not be disturbed on appeal except for an abuse of discretion, which does not appear here: *Deering v. Quivey*, 26 Or. 556, 557 (38 Pac. 710).

2. It is also claimed that the court erred in finding that the tax sale is void for want of a levy upon the property under the warrant. By the terms of the statute in force at the time of the

sale (Sections 2814, 2816, Hill's Ann. Laws 1892) the sheriff was required, under his warrant, when resort was had to the real estate, to make a levy upon the property before advertising it for sale, so that the levy is part of the procedure in the execution of the warrant. But it is claimed by the defendant that the omission of the levy is cured by the terms of Section 3135, B. & C. Comp. It is within the power of the legislature to cure by retroactive enactment such omissions or irregularities in proceedings of public officers as might in the first instance have been dispensed with by it. The levy is an act by the officer which fixes the lien upon the property and determines the date from which the lien will attach, but it is not a jurisdictional or essential act necessary to the validity of the sale. In case the lien is not otherwise created, a sale without a levy transfers only the title of the tax debtor at the time of the sale (2 Freeman, Executions, 3 ed., § 280), and, unless levy is made necessary by statute, the sale is valid without it, and, where it is required by statute, its omission by the sheriff may be cured by subsequent legislative act: *Stanley v. Smith*, 15 Or. 505, 510 (16 Pac. 174). And in this case the absence of the levy was cured by Section 3135, B. & C. Comp.

3. Defendant also claims that the burden is upon the plaintiffs to establish the invalidity of the tax sale. By legislative act of 1901 (Gen. Laws 1901, p. 72: Sections 3131-3136, inclusive, B. & C. Comp.), provision is made for the disposition of property purchased by the county at tax sales. Section 3131 provides:

"If no redemption shall be made, title to the lands so sold shall vest in the county * * without issuance of deed or other formality."

By Sections 3133, 3136, B. & C. Comp., the sheriff is authorized on the first Monday in July of each year to sell to the highest bidder the lands theretofore bid in by the county for taxes, and to which it shall have acquired title, as provided in Section 3131. Section 3135 is curative of the irregularities occurring in tax proceedings resulting in the county's title, and also provides

for a deed to the purchaser at the sale of the county's title, under Section 3133, and makes such deed "conclusive evidence of the regularity and existence of all proceedings necessary to pass title to the lands therein conveyed, and of title in the grantee, except" as to certain matters relating to the assessment, previous payment of the tax, etc.

Defendant relies upon his deed and its effect under Section 3135, B. & C. Comp., as casting the burden upon the plaintiffs to show the invalidity of the tax sale. The well-established rule, when not modified by statute, is that the burden of proof is on the holder of the tax title to maintain his title by affirmatively showing that the provisions of the law have been complied with: *Strode v. Washer*, 17 Or. 50, 57 (16 Pac. 926); *Bays v. Trulson*, 25 Or. 109, 114 (35 Pac. 26); *Brentano v. Brentano*, 41 Or. 15, 19 (67 Pac. 922); *Marx v. Hanthorn*, 148 U. S. 172, 180 (13 Sup. Ct. 508: 37 L. Ed. 410).

4. By Section 3127, B. & C. Comp., in case of a tax sale to a private purchaser, the deed is made *prima facie* evidence that the provisions of the law have been fully complied with, but this does not apply to a purchase by the county, as no deed is provided for in such case.

5. Nor is there any other statute that has that effect, unless it is Section 3135 above quoted, in which the deed is made conclusive evidence; but the part of the section referring to the evidentiary effect of the deed can only apply to the regularity and existence of such proceedings as are the foundation of the deed, and cannot operate as evidence of the regularity and existence of the proceedings necessary to transfer the tax debtor's title to the county. To give it that effect would make it evidence of facts with which it has no connection. The limit of its effect in that regard is to such facts as constitute a compliance with the law in the sale to the defendant, as prescribed by Section 3133, B. & C. Comp., and therefore in this case the rule above quoted is not changed by statute, and the burden is on the defendant to prove the regularity of the tax sale proceedings: *Brentano v. Brentano*, 41 Or. 19 (67 Pac. 922); *Bays v. Trulson*, 25 Or. 114 (35 Pac. 26).

6. There is no evidence before the court that the property was advertised for sale or sold to the county. At the trial the officer who made the sale identified as his return on the tax warrant what we understand was a copy of the printed notice of the tax sale, cut from the newspaper, headed, "Sheriff's Sale for Delinquent Taxes," which was attached to the delinquent tax roll, and upon which was interlined or written at the time of or after the sale, opposite the name and description of the property, the name of the purchaser and the selling price in each case. This so-called return is dated September 18, 1899, the date of the notice, but to which is attached this certificate of the officer:

"The foregoing return of delinquent tax sales for the year 1898 is true and correct in every detail.

Dated the 27th of October, 1899."

This does not show an advertisement of the property for sale or a sale. The warrant for the collection of delinquent taxes must be executed and returned in like manner as an execution against property: Section 3118, B. & C. Comp. The sheriff must make written return of an execution, setting forth his doings thereon: Sections 245, 1014, B. & C. Comp. In *Hall v. Stevenson*, 19 Or. 153, 157 (23 Pac. 889; 20 Am. St. Rep. 803), relating to a return on a writ of attachment, it is said: "The return must state what was done, and the presumption that the officer has done his duty is not sufficient to supply a material factor or circumstance which does not appear in his return." The return is mandatory, and must be in writing, and is the primary evidence of what was done by the sheriff in the execution of the warrant: 3 Freeman, Executions (3 ed.), 356.

7. Without a due return showing the advertisement of the property and the sale, there is no evidence of title in the county. These are essential elements in the proceedings, and the absence of them cannot be cured by the legislature: *Stanley v. Smith*, 15 Or. 505, 510 (16 Pac. 174); *Ferguson v. Kaboth*, 43 Or. 414, 421 (73 Pac. 200, 74 Pac. 466); *Marx v. Hanthorn*, 148 U. S. 182 (13 Sup. Ct. 508; 37 L. Ed. 410). As we have

already seen, the return upon the warrant, which is the evidence of the sheriff's acts, does not show that there was an advertisement and sale of the property for taxes, and hence there is no evidence of the county's title, and it must fail. As the county acquired no title under the tax-sale proceedings, defendant acquired none by the sale under Section 3133, B. & C. Comp., which only authorizes the sheriff to make sale of lands to which the county had acquired title.

The decree of the lower court is affirmed.

AFFIRMED.

Argued 26 March, decided 30 April, 1907.

TILLAMOOK COUNTY v. WILSON RIVER ROAD CO.

89 Pac. 958.

TURNPIKES AND TOLL ROADS—COUNTIES—CONTRACTS—LEASE OF ROAD.

1. A county contracted with a toll road company by which the county leased to the company for a specified term a county road to be repaired and maintained by it in the location of the toll road. The lease recited that the road was a public burden, requiring large expenditures of money to maintain it, as an inducing cause for the lease. *Held*, that the contract was a lease enforceable under B. & C. Comp. §§ 4937-4950, relating to counties leasing public roads and fixing a rate of toll, etc., and was not an agreement executed under Sections 5074, 5077, relating to proceedings to condemn land for a public use.

ACTION—JOINDER OF ACTIONS.

2. A county in a suit for the forfeiture of a lease of a county road for failure of the lessee to comply with the terms thereof cannot join a claim to avoid the lease because made without authority or not fully executed.

ACTION—COURTS—JURISDICTION.

3. Under B. & C. Comp. § 4946, authorizing the district attorney of a county to "maintain an action" against a lessee of a county road to have the lease declared forfeited for failure to comply with its provisions, etc., the proceeding referred to is a suit for cancellation and not a law action.

From Tillamook: **GEORGE H. BURNETT**, Judge.

Statement by **MR. JUSTICE EAKIN**.

This is a suit by Tillamook County against the Wilson River Road Co. to cancel and annul an agreement or lease between the plaintiff and defendant. There was decree for defendant, and plaintiff appeals. In the year 1901 the plaintiff and the defendant entered into an agreement by which plaintiff leased to

the defendant for a term of 50 years, a certain county road, to be repaired and maintained by it, as necessary and convenient in the location of the toll road which it was organized to open and maintain, defendant to hold plaintiff harmless from liability by reason of any accident thereon. The plaintiff alleges that in the making of this lease the terms of Section 4938, B. & C. Comp., were ignored, which requires the county court to advertise for bids for such leasing, and also the failure of the defendant to execute the undertaking required by Section 4940, B. & C. Comp., for the faithful performance of the terms of the lease; that the defendant has failed to keep the road in repair, and the same is now unsafe and dangerous to the public travel, and asks that the lease be canceled, annulled and forfeited. A motion was filed by the defendant to strike out of the complaint the allegations of failure to comply with the terms of Sections 4938 and 4940, B. & C. Comp., in the execution of said lease, which motion was sustained by the court, and thereafter a demurrer to the complaint was filed on the ground that it does not state facts sufficient to constitute a cause of suit, which was sustained and the suit dismissed. **REVERSED.**

For appellant there was a brief over the names of *John H. McNary*, District Attorney, *W. H. Cooper* and *W. H. Holmes*, with oral arguments by *Mr. McNary* and *Mr. Holmes*.

For respondent there was a brief over the name of *Handley & Thayer*.

Opinion by MR. JUSTICE EAKIN.

1. Plaintiff brings this suit under Section 4946, B. & C. Comp., which provides that where a lessee, under the provisions of Sections 4937-4950, B. & C. Comp., fails or neglects to comply with the provisions of the lease, the district attorney may bring an action to have the lease declared forfeited. Defendant claims that this lease or contract was executed under Sections 5074 and 5077, B. & C. Comp., relating to condemnation proceedings. The agreement provided for in Section 5077, B. & C. Comp., is not a lease, but results in condemnation, as though

accomplished by judgment. There is nothing in the complaint or in the lease to indicate that it was intended as an agreement in condemnation, but, on the contrary, appears to be made to comply with or to take advantage of the terms of Section 4937, B. & C. Comp., which provides that whenever a road is so located that there is little or no labor along the line of it, the county may lease it to a corporation to open, improve and keep the same in repair for a period not exceeding 10 years.

The lease recites that the road is a great public burden, requiring large expenditures of money to maintain it, as an inducing cause on the part of the county to make the lease. It contemplates that the county is still the owner of the road and liable for its condition, and we conclude that the contract is a lease, and therefore must be construed and enforced under the provisions of Sections 4937-4950, B. & C. Comp., inclusive.

2. Section 4946, B. & C. Comp., under which plaintiff brings this suit, only provides for forfeiture of the lease for failure to comply with its provisions, and therefore plaintiff cannot join in the same proceeding a claim to avoid the contract because made without authority, or because not yet fully executed by filing the undertaking provided for, therefore the motion to strike out was properly allowed.

3. The complaint sufficiently alleges the failure and neglect by the defendant to comply with the provisions of the lease. Defendant, however, insists that the proceeding under this section should be at law, and not in equity. The language of Section 4946, B. & C. Comp., "may maintain an action," must be construed to mean suit in equity for the reason that the relief provided for therein can only be granted by a court of equity. Pomeroy (volume 1, § 170) says: "Another quality of the distinctively equitable remedies * * is their specific character, both with respect to substance and form. Except in actions to recover possession of land or of chattels, the legal remedies by action are all general recoveries of specified sums of money." Here the relief sought is the forfeiture of the lease; in other words, to cancel the instrument by which defendant holds title,

so that plaintiff may be restored to its title and possession. This belongs exclusively to equitable remedial jurisdiction. Mr. Pomeroy, in defining exclusively equitable jurisdiction, mentions several classes of subjects, under the second of which he says: "The important remedies contained in this class are re-execution of instruments, reformation of instruments, surrender or discharge of instruments and cancellation or rescission": Section 171, B. & C. Comp. And such relief cannot be given in an action at law.

The term "action," used in Section 4946, B. & C. Comp., is not necessarily equivalent to "action at law." In *Ex parte Miligan*, 71 U. S. (4 Wall.) 2, 112 (18 L. Ed. 281), it is said: "In any legal sense, 'action,' 'suit' and 'cause' are convertible terms." Anderson's Dictionary adopts this language, and Bouvier's definition in its broader meaning includes suits. Our own statute maintains a distinction between "action at law" and "suit in equity," indicating that the distinction is not based upon the word "action" alone; and in *Fenstermacher v. State*, 19 Or. 504, 506 (25 Pac. 142), it is held that the term "civil actions" includes actions at law and suits in equity. The provisions of this section determine that the remedy is in equity; and whether there is some relief that might be obtained at law is immaterial. It would not be adequate nor would it exclude equitable jurisdiction under this statute, and the court committed error in sustaining the demurrer.

Cause reversed and remanded for such further proceedings as may be deemed proper and not inconsistent with this opinion.

REVERSED.

Argued 27 March, decided 30 April, 1907.

MULKEY v. DAY.

89 Pac. 957.

ACTIONS—HOW DISPOSED OF—NONSUIT.

1. Actions at law in Oregon cannot be "dismissed" by either party or disposed of in any way except by a judgment or an order of nonsuit.

TRIAL—WHEN ISSUES ARE ACCOMPLISHED.

2. Before a case can be said to be ready for trial under Section 113, B. & C. Comp., which defines a trial, the case must be at issue on either

law or facts as to all parties, and no trial can be demanded when some parties have answered and others have moved or demurred.

JUSTICES OF THE PEACE—TIME FOR PLEADING—NONSUIT.

3. A justice of the peace has no authority to grant an order of nonsuit for want of a pleading within less time than is allowed by law to file such plea, and his action in so doing is in excess of his jurisdiction.

From Lane: LAWRENCE T. HARRIS, Judge.

Statement by MR. COMMISSIONER SLATER.

This is an appeal from the ruling of the circuit court on a petition to review the judgment of a justice's court dismissing an action brought by V. F. Mulkey against G. L. Day and his wife. The complaint was filed in the justice's court on June 5, and summons was thereupon issued and served on the 6th. On the 10th subpoenas were issued by the justice in behalf of the defendants, and his docket shows an entry that he personally informed plaintiff's husband that the cause was set for trial for June 12, 1905, 10 o'clock a. m. On the 12th, defendants appeared in person and by their attorneys for trial, and on that day a demurrer was filed on behalf of G. L. Day, and an answer on behalf of Mrs. G. L. Day; but no copies of the pleadings appear in the record. Plaintiff not appearing upon that day, defendants filed a motion for dismissal of the action for want of prosecution, which was granted; but, by direction of defendants' attorney, the motion and order thereon were dated as of June 13, 1905. Costs, amounting to \$27.50, were taxed against plaintiff, and on the 13th judgment for dismissal of the action was entered with costs in favor of the defendants. The circuit court affirmed the action of the justice's court, and plaintiff appeals.

The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

REVERSED.

For appellant there was a brief over the name of *Williams & Bean*.

For respondents there was a brief over the name of *Woodcock & Potter*.

Opinion by MR. COMMISSIONER SLATER.

1. What was technically known at common law as a judgment of "*non prosequitur*" and "*nolle prosequi*" and "technical nonsuits," are now covered and included by the term "nonsuits," as defined by our Code: *Buena Vista Freestone Co. v. Parrish*, 34 W. Va. 652 (12 S. E. 817). Mr. Justice BEAN, in *Hoover v. King*, 43 Or. 281, 286 (72 Pac. 880, 882: 65 L. R. A. 790: 99 Am. St. Rep. 754), says: "A judgment dismissing a complaint in an action at law is a proceeding unknown to the statute, and does not necessarily determine any of the issues involved. Costs are but an incident to the judgment, and do not add to its force or effect. A bill or suit in equity may be 'dismissed,' and such dismissal is an effectual bar to a subsequent suit for the same cause, unless given without prejudice: B. & C. Comp., § 412. An action at law, however, is disposed of either by a judgment in favor of the plaintiff or defendant, or one of nonsuit." Defendants' motion will be considered and treated as a motion for nonsuit, as authorized by Section 182, B. & C. Comp., which provides:

"A judgment of nonsuit may be given against the plaintiff, as provided in this chapter; * * on motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when, after the trial has begun, and before the final submission of the cause, the plaintiff abandons it, or when upon the trial the plaintiff fails to prove cause sufficient to be submitted to the jury."

2. The question here to be determined is the right of the justice to call the action for trial on June 12, when plaintiff failed to appear. A trial under our statute is "the judicial examination of the issues between the parties, whether they be issues of law or fact": B. & C. Comp. § 113. An issue of law arises upon a demurrer to the complaint (Section 110, B. & C. Comp.), and an issue of fact upon a material allegation in the complaint, controverted by the answer: Section 111, subd. 1, B. & C. Comp. If, at that time, the cause was as to both defendants at issue upon a question of law or of fact, as defined by the statute, the court could rightfully call for a trial thereof,

and, on plaintiff's failure to appear, judgment of nonsuit could have been rightfully entered against her; but, if it was not thus at issue upon a question of law or of fact, the court could not have called for a trial of the cause or entered such a judgment.

3. As the record does not contain a copy of the proceedings, this court is unable to say that the demurrer on behalf of the defendant G. L. Day was for one of the causes enumerated in Section 68, B. & C. Comp., and it is necessary that the record shows affirmatively the facts conferring the authority or jurisdiction of the inferior tribunal: *Jones v. Marion County*, 4 Or. 46. Neither can we say that the answer of the other defendant, Mrs. G. L. Day, was sufficient in law to raise an issue of fact; but, whatever may have been the nature of her answer, whether it consisted merely of a denial or of denials and affirmative allegations, the plaintiff had one day thereafter in which to plead thereto, as provided in Section 81, B. & C. Comp., which is made applicable to the procedure of a justice's court by the provisions of Section 2200, B. & C. Comp. Until plaintiff's time to plead to the answer had expired, or she had expressly or impliedly waived her right, the cause could not be said to be at issue, and hence a trial could not be legally called by the court within that time, except upon a waiver by her of such right. The answer was filed on June 12, and, excluding the first and including the last day, in computing time, as required by Section 531, B. & C. Comp., plaintiff was entitled to all of June 13 in which to plead further. Hence the court could not have legally called the action for trial against her prior to June 14, without a waiver on her part of her right to plead, which the record does not show.

The judgment reviewed, being for that reason erroneous, should be set aside; hence the judgment appealed from should be reversed, and the cause remanded to the circuit court, with direction to set aside the judgment of the justice's court, and remand the cause for further and proper proceedings not inconsistent with this opinion.

REVERSED.

Argued 14 March, decided 30 April, 1907.

FIRE ASSOCIATION v. ALLESINA.

89 Pac. 960.

JURISDICTION TO ENJOIN ENFORCEMENT OF AWARD BASED ON FRAUD.

1. An award based on the fraud or perjury of the prevailing party will be set aside in equity and its enforcement permanently enjoined, a distinction being recognized between the dignity of a judgment and an award: *Friese v. Hummel*, 26 Or. 145, distinguished.

ARBITRATION AND AWARD—EVIDENCE OF FRAUD.

2. The evidence shows that the successful party to the arbitration in question presented to the arbitrators evidence that he knew to be false and that materially affected the award.

From Multnomah: ARTHUR L. FRAZER, Judge.

Suit by the Fire Association of Philadelphia against John Allesina, resulting in a decree for plaintiff. **AFFIRMED.**

For appellant there was a brief with an oral argument by *Mr. Henry E. McGinn*.

For respondent there was a brief over the name of *Veazie & Freeman*, with an oral argument by *Mr. J. Clarence Veazie*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is an appeal by the defendant from a decree enjoining him from maintaining an action at law on an award determining the extent of his injury by fire to a stock of umbrellas, parasols, etc., and cancelling a policy of insurance on such goods because of an alleged violation of the terms of the contract, which provided that it should be rendered void in case of fraud or false swearing by the insured touching any matter relating to the insurance or to the subject-matter thereof. The issues involved are stated in an opinion announced on a former appeal herein: *Fire Association v. Allesina*, 45 Or. 154 (77 Pac. 123). The cause was remanded, and from the testimony given at the trial the court found that the actual cash value of all the defendant's property contained in his store April 28, 1903, the time of the fire, did not exceed \$7,109.26, which fact he at all times well knew; but that in a written statement of his loss he falsely swore that 3,351 umbrellas were of the value of \$13,-

002.55, and that the worth of the parasols destroyed was \$2,600; that, for the purpose of inducing the plaintiff to believe such statement was true, he exhibited to it a certain book and the entires therein, purporting to be invoices of his stock, taken at various times prior to the fire, and represented to plaintiff that the record was authentic, but that the pretended inventory was not correct, which fact he at the time the memoranda were so offered for inspection well knew. Based on these and other findings, a decree was rendered for plaintiff.

1. It is maintained by defendant's counsel that, assuming the award was superinduced by perjury and fabricated schedules, such testimony and feigned invoices are insufficient to defeat the determination of the appraisers on the issue submitted to them, and hence an error was committed in rendering the decree from which the appeal is taken. In *Friese v. Hummel*, 26 Or. 145 (37 Pac. 458; 46 Am. St. Rep. 610), it was held that equity has no jurisdiction to set aside a former decree for perjury or fraud, unless the willful giving under oath in a judicial proceeding of false testimony material to the issue, or the undue and unconscientious advantage taken of another, is collateral to the prior suit, the court saying: "The reason assigned in support of this rule is that causes once tried by a court having jurisdiction of the subject-matter and the parties should forever be at rest; that the unsuccessful party ought reasonably to expect, if he had an unscrupulous adversary, that perjured testimony would be offered at the trial, and should be prepared to meet it, and that, having gone into a consideration of the merits, he is estopped by the conclusion of the court." When an action or suit is tried in such forum, certain rules of procedure are rigidly enforced that are not generally observed at hearings before arbitrators. In regularly constituted tribunals the parties litigant are usually represented by vigilant counsel, who are more competent and therefore better able to detect and prevent perjury than their clients, who frequently appear without advocates before private persons chosen to settle disputed questions. The solemnity of a court trial is lacking at hearings before arbitra-

tors who, though supposed to be disinterested, are sometimes the active agents of the parties who selected them, and for these reasons we think an award is not entitled to that degree of respect which is accorded to a judgment or to a decree regularly rendered. The rule is supported by authority, and we believe founded in reason, that an award based on the fraud or false testimony of the prevailing party will be set aside in equity in a suit instituted for that purpose, and he will be enjoined from maintaining an action thereon: 3 Cyc. 744, note 33. In addition to the cases cited in the note mentioned, see, also, *North British Ins. Co. v. Lathrop*, 70 Fed. 429 (17 C. C. A. 175); *Wiley v. Platter*, 17 Ill. 538; *Boston Water Power Co. v. Gray*, 6 Metc. (Mass.), 131; *Smith v. Cutler*, 10 Wend. 589 (25 Am. Dec. 580); *Mitchel v. Curran*, 1 Mo. App. 453; *Teal v. Bilby*, 123 U. S. 572 (8 Sup. Ct. 239, 31 L. Ed. 263). We conclude, therefore, that if, in consequence of the defendant's fraud or perjury, he secured the award, a court of equity is competent to and should vacate the determination of the arbitrators and enjoin the maintenance of an action thereon.

2. Considering the case on its merits, the testimony discloses that for several years prior to the fire Allesina maintained a store at No. 309 Morrison Street, Portland, Oregon, where he manufactured, repaired and sold umbrellas, parasols, canes, etc. He kept a record of his business in books, which, having been offered in evidence, show the amount of money daily received for repairing umbrellas, the number recovered, the number sold, which also included parasols without enumerating them, the number of canes sold and the sums of money received for each class respectively, and for goods disposed of at wholesale. At the end of each month the aggregate of these several items was noted at the foot of the columns in which they appeared. Twice each year, until May 1, 1901, he also took an invoice of his stock and entered in a book kept for that purpose the number of umbrellas, parasols, canes and other supplies on hand, the value of each item, the money he had on deposit in banks, and the amount of his debts. Allesina on December 20, 1901, opened a branch

store at No. 286 Washington Street, and all goods sent to that place were first charged to the account of the Morrison Street store; a book having been kept showing the value of the stock so transferred and also of any that was returned. When the branch store was started, the worth of the goods received thereat was marked on slips of paper that were kept on file, and additions were made thereto from time to time until about March 1, 1902, when the aggregate value, \$10,786.25, was entered in the journal as of December 20, 1901. A fire having occurred at the Morrison Street store, April 28, 1903, representatives of the plaintiff and of other insurance companies interested in the loss immediately examined Allesina's stock, the undamaged part of which he retained, consisting of 34 umbrellas, ranging in price from \$3.50 to \$8 each, though one was valued at \$18. The parties not being able to agree as to the extent of the injury, except in some minor matters, Allesina at the request of the adjusters delivered to them all bills showing the goods which he had received from January 1, 1902, to the time of the fire, and also gave them the books which had been kept at the Morrison Street store. The loss not having been adjusted, Allesina presented to the agents of the insurance companies a claim for 1,296 umbrellas at \$8 each, or \$10,368; parasols, without stating the number thereof, \$2,600; 2,055 other umbrellas valued at from 50 cents to \$3.50 each, amounting to \$2,634.55, making a total demand of \$15,602.55. As no part of this sum was paid, the parties by agreement submitted the controversy to arbitrators, one of whom and the umpire found the loss to be \$13,562.18, or \$62.18 more than the indemnity specified in the several policies of insurance. All the other companies interested, except the plaintiff, paid the several sums specified in their contracts, and, to recover from the latter the \$2,000 stipulated, Allesina instituted an action on the award, whereupon this suit was commenced, in the nature of a cross-bill in equity, resulting in a decree as hereinbefore stated.

The insurance adjusters found 505 parasols that had been damaged, but Allesina claims that there were others on the floor

of the store in a pile of rubbish that were not counted, the actual cash value of which, and of the 1,296 umbrellas mentioned, is the question to be determined. Allesina, in an examination upon oath, made pursuant to the terms of the policies of insurance, deposed that he took his last invoice of stock January 1, 1903, and found the cost thereof at the Morrison and Washington Street stores to be \$22,935.80 and \$10,520, respectively. Substituting words for abbreviations where they are used in the inventory, it is as follows:

5,461 Assorted umbrellas.....	\$17,233.00	
260 Assorted handles	682.50	
Umbrella furniture, cover		
and cloth	2,420.75	
810 Assorted parasols	2,600.55	\$22,935.80
Washington Street store	10,520.00	
		<hr/>
		\$33,455.80
To Follmer		13,482.88
		<hr/>
		\$19,972.92

The phrase, "To Follmer," as used in the inventory quoted, refers to Follmer, Clogg & Co., a corporation, doing business at Lancaster, Pa., from which Allesina purchased goods, and the figures appearing on the line with such words are intended to represent the sum of money he owed that company on account of the goods received from it. An invoice of the goods at the Washington Street store, taken January 1, 1903, shows the value thereof to be \$12,217.97, instead of \$10,520, as stated in the inventory of the Morrison Street store of that date, as above quoted. F. J. Alex Mayer, plaintiff's agent, as its witness, testified that he made a memorandum from the books kept at the Washington Street store, showing the items of the inventory made at that place, which writing having been offered in evidence, is as follows:

Umbrellas	\$ 7,882.44
Bases	1,494.84
Canes	390.20
Crops, whips	48.40
Ribs, frames	822.67
	<hr/>
	\$10,638.55
20 per cent.....	2,127.70
	<hr/>
	\$ 8,510.85
Correct by dividing by 120, instead of deducting 20	
per cent, makes	8,865.45
Handles, \$5,785.05	2,892.52
543 yards of silk, net.....	460.00
	<hr/>
	\$12,217.97

H. N. Graham, the manager of the Washington Street store, as defendant's witness, testified that no book was kept showing the items of the inventory as disclosed by the memorandum quoted, in referring to which and to the information it affords he further said: "The only way that I can account for these figures is we might have had something of that kind in taking stock. There might have been a slip of paper." As the value of the goods, \$12,217.97, indicated in the memorandum adverted to, exactly corresponds with the worth thereof as entered in the journal of the Washington Street store, we think there can be no doubt that Mayer saw the items specified in some manuscript and copied them correctly. An examination of a copy of the memorandum will show that 20 per cent was deducted from the first five items of the inventory and 50 per cent from the stated value of the handles. Allesina's attention having been called to the discrepancy in the inventories of January 1, 1903, as it appears by the books of the different stores, plaintiff's counsel, referring to the value of the goods at the Washington Street store, as disclosed by the books of the Morrison Street establishment, asked:

"How did you get it?" and the defendant replied:

"Taking off 15 per cent, that will give the figure. I do not know what I took off. * *

Q. Can you, by figuring off 15 or 20 per cent, or any other per cent, get \$10,520 from the \$12,217.97?

A. I wasn't very particular. I took more or less."

It seems improbable that after deducting from 20 to 50 per cent from the value of most of the stock at the Washington Street store, as appears by Mayer's memorandum, that a further reduction should be made by Allesina in entering the worth of such goods in the books which he kept at the Morrison Street store. A glance at the inventory of January 1, 1903, as entered on the book kept at the Morrison Street store, will show that Allesina indicates his then indebtedness to Follmer, Clogg & Co. to be \$13,482.88. There was introduced in evidence the deposition of H. W. Hartman, the treasurer of that corporation, to which is attached a bill showing that from August 26, 1895, to April 15, 1903, the defendant purchased from his principal goods of the value of \$79,972.10, and paid on account thereof \$66,475.02, thus leaving due thereon, at the latter date, \$13,497.08, or \$14.20 more than is admitted by the invoice. An examination of the bill referred to further discloses that from January 1, 1903, to April 15 of that year, Allesina purchased from that corporation goods valued at \$2,095.63, and within that time he received credits on account, amounting to \$6,581.43, thereby demonstrating that on January 1, 1903, he was indebted to Follmer, Clogg & Co. in the sum of \$17,982.88, instead of \$13,482.88, as he states in the inventory, a difference of just \$4,500.

The books of the Washington Street store indicate the number of parasols sold thereat, but the number disposed of at the other store is included in the number of umbrellas. The testimony shows, however, that from January 1, 1903, to the time of the fire, no parasols had been sold at the Morrison Street store, and for this reason Allesina made a claim for the entire value thereof as stated in the last invoice at time it was made. From January 1, 1903, to April 28 of that year, Allesina's books and bills show that he purchased and that there were delivered at the Morrison Street store 1,238 umbrellas. Within

that time he sold at the store 1,343, transferred to the other store 1,053, and that there were found in the building after the fire 3,351 damaged umbrellas and 34 that were uninjured, so that on January 1, 1903, he necessarily had on hand 4,543 umbrellas at the Morrison Street store. It will be remembered, however, that the inventory of that date states that there were at such place 5,461 umbrellas—an overstatement of 918. The pretended record of Allesina's assets and liabilities on January 1, 1903, is therefore false in the particulars specified, and cannot be relied upon as furnishing any information from which the extent of his loss may be determined. It is impossible to state with any degree of certainty the value of the 1,296 umbrellas or of the 505 or more parasols for the damage to which a claim of \$10,368 and \$2,600, respectively, was made. Many of the umbrellas purchased had no handles, in which condition they were known to the trade as "bases." Allesina asserts that the worth of an umbrella depends largely upon the kind of a handle placed thereon, and that the cost of the completed articles exceeded the sums demanded therefor. We have earnestly tried, in every way that seemed feasible, to determine the extent of the loss, but have found it impossible. Some very valuable handles were undoubtedly destroyed by the fire, but, after many days' search in examining the books and bills offered in evidence, we are forced to the conclusion that the number of such handles, when attached to the bases, together with other completed umbrellas, constituting the number last mentioned, were not worth anywhere near the sum demanded for them, and what has been said of the umbrellas is also true of and applicable to the parasols.

From the fraudulent inventory which Allesina testified was correct, and from other circumstances connected with the case, we must determine that his sworn statement of his loss was made with knowledge of its falsity, as to the extent thereof, and, this being so, the decree is affirmed.

AFFIRMED.

Argued 27 March, decided 21 May, 1907.

GRANT v. OREGON NAVIGATION CO.

90 Pac. 178, 1099.

NAVIGABLE WATERS—WHARF RIGHT OF UPLAND OWNERS.

1. Under B. & C. Comp. § 4042, providing that the owner of any land lying on navigable water within the corporate limits of a city is authorized to construct a wharf on the same and extend it to navigable water, the upland owner is given a preference right or license to occupy land under water for wharfage purposes, the exercise of which becomes a vested right.

NAVIGABLE WATERS—RIGHT OF UPLAND OWNER TO WHARF OUT TO CHANNEL—INCIDENTAL RIGHTS ACQUIRED BY PURCHASE OF UPLAND.

2. An upland owner was by the acts of 1872 and 1874 given the preference to purchase the tide land in front of his holdings, and if he exercised that privilege he thereby became entitled to the exclusive wharf rights to deep water, provided such right had not already become vested in another under prior acts, and as incidental to this wharf right he became entitled to all accretions to such tide land and to change the surface, so long as he does not interfere with navigation or commerce.

COLLATERAL ATTACK ON DEED TO PUBLIC LAND.

3. A deed from the state for tide land is not void because the line of high tide was further out than the land conveyed, so that it did not reach the water at all, but is only voidable for such defect, and not subject to collateral attack.

EFFECT OF CONVEYANCE OF SUBMERGED LAND—INTENT OF GRANTOR.

4. Although usually a deed to land having a water frontage carries the rights incident to such position, yet a deed of submerged land will be given effect as to riparian rights according to the intention of the grantor, and a description by metes and bounds or according to a plat strongly indicates a restrictive rather than an extensive intention.

Where a grantor conveyed by metes and bounds a portion of a lot below low tide, which was a part of a town plat containing other blocks between that and deep water, it sufficiently appears that such grantor intended that no riparian right should pass to the grantee, who was not, therefore, entitled to deep water frontage.

ADVERSE POSSESSION—EFFECT OF OCCUPANCY WITHOUT COLOR OF TITLE.

5. The effect of an open, notorious, continuous and exclusive occupation of real property, under a claim of right, for the period prescribed by the statute of limitations is to confer title to the ground actually so occupied, though there was no color of title whatever.

ALLOWANCE OF COSTS AND DISBURSEMENTS IN EQUITY.

6. The apportionment of costs in equity is entirely discretionary with the court under Section 566, B. & C. Comp., and in this case plaintiffs will be allowed their costs in the lower court, while defendants will recover their costs on appeal.

Where, on appeal by defendants in a suit to quiet title, a decree is rendered that plaintiffs are the owners of a portion of the property which was the subject of the suit, and their title thereto is quieted, they are entitled to their costs in the trial court, though adjudged to be without interest in the remainder of the property, defendants having denied plaintiffs' right to any of the property.

From Clatsop: THOMAS A. MCBRIDE, Judge.

Statement by MR. JUSTICE EAKIN.

This is a proceeding by Bridget and Peter Grant against the Oregon Railroad & Navigation Co. to quiet title to the property lying between plaintiff's lot and deep water, and to enjoin defendants from driving piles thereon. There was a decree for the plaintiff, and the defendants, Oregon Railroad & Navigation Co. and D. H. Welch, appeal. The land above high water, upon which the City of Astoria is situated, bordering upon tide water of the Columbia River, was the donation land claim of Shively and wife, and was platted by him into town lots and blocks as "Shively's Astoria," some of the blocks of which extend below high water; and afterward he platted other property wholly below low water, as "Shively's Second Addition to Astoria," which includes blocks 5 to 12, inclusive. The property owned by plaintiffs, and which they claim is riparian and gives them wharfage rights to deep water, is the south 75 feet of lot 5, block 8, of Shively's Second Addition to Astoria, and lies in a tier of blocks extending from the shore line north below low water, numbered as follows: Block 118 upland, 135 tideland (both in Shively's Astoria), and blocks 8, 7, 6 and 5 of Shively's Second Addition to Astoria, extending to or into deep water. Each of said blocks is 300 feet east and west and 125 feet north and south, containing six lots, numbered 1 to 6 from east to west, with streets 60 feet wide; Commercial Street lying east and west between blocks 135 and 8, Fourteenth Street lying north and south and west of blocks 135 and 8, Fifteenth Street lying east of said blocks, and Sixteenth street the next street east. Block 134 lies immediately east of said block 135, and the shore line extends westerly through block 134 near the south side, and through block 135, to the southwest corner of lot 5 and passing south of the south line of lot 6, but north of the middle of the street, and the line of low tide being about the middle of Commercial Street, south of block 8. Taylor, the common grantor of plaintiffs and defendants, acquired title to the shore of lot 5, block 135, in the year 1865. This lot is

immediately south of the property in dispute, and the shore line is north of the south line of that lot, and in the year 1871, while Shively was the owner of portions of the shore between Fourteenth and Sixteenth Streets, he conveyed to Taylor said blocks 5 to 12, which included all the ground from low tide to deep water in front of blocks 134 and 135, and thereafter, in the year 1875, Taylor conveyed by metes and bounds to the Oregon Steam Navigation Co. all of said blocks 5 to 12 lying north of a line parallel with and 75 feet north of Commercial Street, which includes the north 50 feet of said lot 5, block 8.

Thereafter, on August 3, 1876, Rogers purchased from the state the tide land fronting on lots 5 and 6 (formerly 2 and 3) of block 118 in Shiveley's Astoria, and on November 14, 1881, he conveyed to Taylor lots 4, 5 and 6 of said block 118 and the tide land fronting on lots 5 and 6 thereof; and on November 15, 1886, Taylor conveyed to the plaintiff Mrs. Grant the south 75 feet of lot 5, block 8, describing the same by metes and bounds with reference to said lot and block. And during the year 1876 the Oregon Steam Navigation Co. commenced the construction of its wharf on the said ground purchased from Taylor, and drove two rows of piling on the south line of its purchase, from Fourteenth Street to Sixteenth Street, and covered the same with planking most of that distance, the same being called a roadway, and also drove a third row of piling outside of the roadway as fenders, which roadway was connected with its main wharf and warehouse at deep water (which wharf extended west to the west line of Fifteenth Street) and was used by it for the convenience of its boating until 1883, when it was destroyed by fire. The piling still remains, but is burned down to the water's edge, and the defendant Oregon Railroad & Navigation Co., as successor to the Oregon Steam Navigation Co., threatens to drive piles upon said property which plaintiffs seek to enjoin. Since about 1884 plaintiffs occupied this piling immediately north of their ground for a width of 13 feet, 5 inches, north and south, and 50 feet east and west, for a platform, on which is situated a woodshed and other conveniences to their building.

MODIFIED.

For plaintiffs there was a brief over the names of *J. Q. A. Boulby and Fulton Bros.*, with an oral argument by *Mr. Chas. W. Fulton* and *Mr. George C. Fulton*.

For defendants there was a brief over the names of *W. W. Cotton, Thomas O'Day* and *James Gibson Wilson*, with an oral argument by *Mr. Wilson*.

Opinion by Mr. JUSTICE EAKIN.

1. The defendant, Oregon Railroad & Navigation Co., claims title to the wharfage rights in front of plaintiff's property by virtue of the conveyance thereof from Taylor to its grantor, the Oregon Steam Navigation Co., in 1875, and prior to the sale of the tide land by the state. By the legislative act of 1864 (Section 4042, B. & C. Comp.), it is provided that the owner of any land lying upon navigable water within the corporate limits of a city is authorized to construct a wharf upon the same and extend it below low water. Thus, the upland owner was given the preference right or license to occupy the same for wharfage purposes, and, if such license was exercised by himself or his grantee, it became a vested right: *Parker v. Taylor*, 7 Or. 435. Taylor, by his ownership of lot 5, block 135, and the conveyance to him by Shively, claimed the wharfage rights in front of said blocks 134 and 135 in 1875, under and by virtue of said Section 4042, B. & C. Comp. By Section 4043, B. & C. Comp., cities are authorized to regulate the exercise of a wharfage right by ordinance upon the application of the owner of such right, and on the petition of Taylor in October, 1875, the City of Astoria did pass an ordinance for that purpose, and by his deed to the Oregon Steam Navigation Co. in November, 1875, Taylor conveyed to it his wharfage rights, which included the north 50 feet of said lot 5, block 8. The Oregon Steam Navigation Co. commenced the erection of its wharf and warehouse at deep water and the erection of the roadway at the south line of the property conveyed to it by Taylor in the year 1875. It does not appear definitely when such construction was commenced or finished, but evidently the roadway had been constructed in July,

1876. However, whether it was constructed, or, if so, whether it was a sufficient compliance with Section 4042, B. & C. Comp., to vest title, is not necessary now to determine.

2. Plaintiffs claim that by virtue of their ownership of part of lot 5, block 8, lying below low water, they are thereby owners to the center of the stream and of the wharfage rights to deep water, as incident thereto, and by this suit seek to quiet their title to the same, as against defendants. Their right to such relief depends largely upon the effect of the deed from Taylor to Bridget Grant. If, by that deed, the low-water line were the boundary, with no reservation of the riparian right, it would pass as an incident thereto; but it is within the power of the riparian owner to separate the riparian rights from the ownership of the shore, and this is largely a question of the intention of the grantor. Originally the state was the absolute owner of the tide lands on the Columbia River and the rights incident thereto below the meander line out to deep water: *Bowlby v. Shively*, 22 Or. 410 (30 Pac. 154); *Shively v. Bowlby*, 152 U. S. 1 (14 Sup. Ct. 548; 38 L. Ed. 331). By the legislative acts of 1872 (Laws 1872, pp. 129, 130) and 1874 (Laws 1874, pp. 76, 77), the upland owner was given the preference right to purchase the tide land, and upon such purchase, if not already vested in another under Section 4042, B. & C. Comp., he thereby acquired also the exclusive wharfage right to deep water, and also all accretions to his tide land and the right to fill up the shallows or flats, so long as he does not impede navigation or interfere with commerce over the same: *Miller v. Mendenhall*, 43 Minn. 95 (44 N. W. 1141; 8 L. R. A. 89; 19 Am. St. Rep. 219, 231). In *Parker v. Taylor*, 7 Or. 435, Judge BOISE says: "Land situated as this is, covered with shoal water, may, under proper regulations by the state and municipal authorities, be reclaimed from the sea by filling in or by driving piles and building on them, and becomes private property and the subject of sale the same as any other property. And as this state has given such mud flats to the riparian owner as a franchise, he alone may reclaim the same, under such regulations as the state has or shall prescribe": *Bowlby v. Shively*, 22 Or. 410 (30 Pac. 154).

3. On August 3, 1876, Rogers purchased from the state the tide land in front of lots 5 and 6, block 118, claiming that such lots extended to the meander line of the river, and received a deed therefor. Defendants question the validity of Rogers' title to this tide land, for the reason that the high-tide line was upon the next block north, viz., 135; but, if so, the deed is not thereby void, but only voidable, and his title cannot be questioned collaterally.

4. When Taylor acquired the tide land in front of lot 5, block 135, by his deed from Rogers, in November, 1881, he thereby acquired all rights incident thereto in front of the high land below the meander line out to the channel of the river, if not already owned by the Oregon Steam Navigation Co. This ground had all been platted into lots, blocks and streets, as Shively's Second Addition to Astoria, which plat was recognized by both Taylor and the plaintiff at the time of Taylor's conveyance to her. Ordinarily a conveyance of land abutting upon the shore carries with it to the grantee therein all rights incident to the shore line; but, where land extending under the water is conveyed by metes and bounds, or the conveyance shows in any manner the intention of the grantor to reserve the riparian rights, the same will not pass to the grantee. It is within the power of the riparian owner to separate the riparian rights from the upland, and in every case it would be a question of the intention of the parties whether it has been so separated. Farnham, in *Waters & Water Rights*, § 724, in discussing the separation of riparian rights from the upland, says: "The separation may also be effected by a conveyance by metes and bounds which gives the line along the shore a definite location and indicates an intention that the title to the land under the water shall not pass. The same result will be obtained by platting of land under the water so that the land on the bank is not riparian in the strict sense of the word. Nor are any of the inside lots which are platted under the water riparian. The question whether, by platting in a particular manner or by a grant, the owner of the shore of navigable waters dissociates the

rights incident to ownership of the shore from that ownership, is wholly one of his intention."

In *Goodsell v. Lawson*, 42 Md. 348, 366, a town was platted partly on the water. A lot upon the water was conveyed to Godman, which it was claimed entitled her to riparian rights. It is said: "It cannot be supposed for a moment that the owners of the projected town intended to confer on the purchasers of lots to be created from the water riparian rights such as we have been considering. * * This lot is partly on the land and partly in the water, and is located with reference to the town plat. It must therefore be construed with reference to that plat and the designs therein manifested. It will be seen, also, by an examination of the deed, that it does not call for a water line. The description is by courses and distances, and these must circumscribe the title of the purchaser." At page 373, it is said: "That deed conveyed by metes and bounds 'a lot of ground in the Town of Crisfield, being part of block No. 19 on the plat of said town,' and must be construed with reference to said town plat." In *Eldridge v. Cowell*, 4 Cal. 87, in the plan of San Francisco, the survey into lots and blocks extended into the tide water in front of the city. Plaintiff obtained his lot with knowledge of the plan of the city. It is held that it is not material to inquire as to the first authority for the plan of the city. The state's title vested in the lot owners, and plaintiff took without any riparian rights. In *Kenyon v. Knipe*, 2 Wash. 394, 397 (27 Pac. 227, 228; 13 L. R. A. 142), it is said: "A deed conveying property by reference to a plat or map thereof adopts such plat or map as a part of such deed, and one purchasing thereunder becomes bound by the boundaries of the lot purchased as they appear on said plat or map. Applying this rule to the case at bar, it will be seen that the plaintiff herein did not purchase lots bounded by tide water, but those bounded by a definite and defined line, * * and he is estopped by such fact from claiming any rights beyond such boundaries." To the same effect is *State ex rel. v. Forrest*, 12 Wash. 486 (41 Pac. 194). In *Gilbert v. Emerson*, 60 Minn. 62 (61 N. W. 820), it is held

that the plaintiff, having purchased a block of submerged land, is deemed to have purchased with reference to the plat showing the blocks and alleys: "It is not a case, therefore, where the outermost alley line is coterminous with the boundary line of the owner of the premises platted. * * Nor is this a case where this outermost alley line is the water-line boundary, and where, in such a case, it might be held that riparian rights would exist in behalf of a person who held the title to such line. * * This map, with reference to this alley line, must be construed so as to give effect to the intention of the maker thereof." In *North-ern Pac. R. Co. v. S. & H. L. Co.* 73 Minn. 25 (75 N. W. 737), it is held that a platting of submerged land severed the riparian rights from the shore banks and attached them to the outermost tract. To the same effect is *Gilbert v. Emerson*, 55 Minn. 254 (56 N. W. 818; 43 Am. St. Rep. 502). This is also the effect of *Parker v. Taylor*, 7 Or. 435.

Taylor, by his deed to Mrs. Grant conveyed to her the south 75 feet only of said lot 5, block 8, being the portion of said lot lying south of the south line of the tract conveyed by him to the Oregon Steam Navigation Co.; there still remaining to himself or his grantee the north 50 feet thereof. And where, by reason of his tide-land ownership, he conveyed to plaintiffs by metes and bounds a portion of a lot below low tide, being part of the town plat containing other blocks between that and deep water, the intention of the grantor that no riparian rights shall pass clearly appears, and plaintiffs' rights are circumscribed by the description in the deed, and are not riparian; and therefore they are not entitled to deep-water frontage.

5. Plaintiffs also claim title by adverse possession to the property in dispute. They have shown no color of title to any of it, and therefore such claim can only apply to so much of the property as has been in their open, notorious, continuous and exclusive occupation under claim of right for the period of 10 years. Plaintiffs have been in such possession of the portion thereof covered by the old platform adjoining their building extending north 13 feet, 5 inches, and the full width of the lot,

viz., 50 feet; and it also appears that the building extends 1 foot 1 inch north of the north line of the property described in plaintiffs' deed. Therefore the decree of the lower court is reversed, and a decree will be entered here quieting plaintiffs' title to that lot or parcel of ground bounded as follows: Commencing at the northwest corner of the property conveyed by James Taylor to Bridget Grant by deed of date, November 15, 1886; thence north 14 feet 6 inches; thence east 50 feet; thence south 14 feet 6 inches; thence west 50 feet, to place of beginning—and that plaintiffs have no interest in the other portions of the property in dispute; defendant to recover its costs and disbursements in this court, and neither party to recover costs in the lower court.

MODIFIED.

Decided 16 July, 1907.

ON MOTION TO MODIFY AWARD OF COSTS.

MR. JUSTICE EAKIN delivered the opinion.

6. Petition of plaintiffs to modify the decree as to costs. In the decision of this case this court decreed costs to defendants on this appeal, and that neither party should recover costs in the trial court. Plaintiffs' counsel now urge, in view of the fact that by the final decree plaintiffs are adjudged owners of a portion of the property which was the subject of the suit, and their title thereto was quieted, they should recover their costs in the trial court; and we concede that this is correct. Defendants, in their answer, denied plaintiffs' right to any of the property, and set up title and right of possession thereto in themselves. Thus it appears that plaintiffs were forced to bring this suit to protect their title and possession to the portion thereof adjudged to them by this court. Therefore the decree will be modified to the extent that defendants shall recover costs upon this appeal, and plaintiffs shall recover against the defendants their costs and disbursements incurred in the lower court.

MODIFIED.

Argued 29 March, decided 28 May, rehearing denied 22 December, 1907.

KRAMER v. WILSON.

90 Pac. 183.

DEED AS A MORTGAGE—EFFECT OF EVIDENCE.

1. A review of the evidence leads to the conclusion that the deed under consideration was in fact a mortgage to secure advances made by the grantee.

EFFECT OF MORTGAGE DEED—PAROL EVIDENCE.

2. A deed intended as a security will be treated as though it were a mortgage and its true nature may be shown by parol evidence.

FORM OF DECREE ON FORECLOSURE OF SECURITY AGREEMENT.

3. In view of Section 5339, B. & C. Comp., providing that no mortgage shall be construed as implying a covenant to pay the sum secured, and, in the absence of such a covenant or other instrument to secure such payment, the remedy of the mortgagee shall be confined to the lands mentioned in the mortgage; the decree foreclosing a deed given as a mortgage should direct only a sale of the property and an application of the money received to the payment of the costs and disbursements and the debt, without any personal or deficiency judgment.

From Josephine: **HIERO K. HANNA**, Judge.

Statement by **MR. COMMISSIONER SLATER**.

This is a suit by Willis Kramer against H. L. Wilson and others filed as an answer to an action at law brought by Wilson against Kramer.

On July 18, 1904, W. G. Palmer and his wife conveyed to plaintiff, by deed absolute in form, 11 quartz mining claims in Josephine County, together with a mill site and ditch with water rights. The consideration expressed in the deed is the sum of \$30,000. On the same day, and as a part of the same transaction, plaintiff executed a contract note in favor of Palmer in the following form:

"\$6,000.00.

Grants Pass, July 18, 1904.

For value received, I promise to pay to W. G. Palmer, or to his order, the sum of six thousand dollars, lawful money of the United States of America, payable at Grants Pass, Oregon, in two installments of \$3,000 each, as follows: \$3,000 on or before one year from date, and \$3,000 on or before eighteen months from date, with interest on said sums after maturity at the rate of eight per cent per annum.

Provided, nevertheless, the above sums of money are understood and agreed to be payable only out of the money arising

from the sale of certain mining claims and property this day conveyed (July 18, 1904) by W. G. Palmer and L. B. Palmer to Willis Kramer, or in case of failure to consummate the sale of said mines now contemplated, then the money due or to become due hereon to be collectible only out of the proceeds of the sale of said claims, the claims herein mentioned being a group of claims and water rights and mill site described in said deed.

Willis Kramer."

A short time prior to March 3, 1906, Palmer assigned the note to H. L. Wilson, who on that day began an action against Kramer to recover the amount of the note; and thereupon the latter filed his cross-complaint in equity, alleging in effect that prior to the making of the deed he was the owner and entitled to a conveyance from Palmer and wife of an undivided one-half interest in all of the property therein described, and that the remaining one-half was conveyed to him as security for \$3,500 which he claims Palmer owed him for his one-half of the expenses of operating the mine prior to that time, and to secure the payment of the sum of \$3,000 that day advanced by him to Palmer to aid the latter in completing a contemplated sale of his one-half to one W. R. Stewart, that these sums were to be paid him out of the proceeds of the sale, and that the note in question was given by him to Palmer to evidence the latter's rights and interest in the proceeds of the mine, after receiving payment of his own claims. He prays that the deed be declared to be a mortgage upon Palmer's interest to secure these amounts, and that the same be foreclosed and the property sold; that he be paid first out of the proceeds, and the residue, if any, be paid to Wilson; and that the action at law be enjoined and the note ordered canceled and delivered up to plaintiff. Palmer and wife were made defendants, and all answered jointly, denying that Palmer was indebted to Kramer in any amount whatever, or that the deed was intended by the parties to be a mortgage; but alleging in effect that the deed is what it purports to be upon its face; that the properties mentioned therein were sold and conveyed to plaintiff by the defendants, Palmer and wife, for the agreed price of \$9,000, of which sum \$3,000 was paid on the

making of the deed, and that the note above mentioned was for the balance; that a reasonable time had elapsed since the date of the note in which plaintiff could have sold the mines. A personal judgment for the amount of the note is demanded. There was a decree for defendants dismissing the suit, from which plaintiff appeals.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. George W. Colvig, Andrew Murray Crawford and William P. Lord.*

For respondents there was a brief and an oral argument by *Mr. Robert Glenn Smith.*

Opinion by MR. COMMISSIONER SLATER.

It is admitted by the defendants in their brief that the note is nonnegotiable in character, and subject to any defenses in the hands of Wilson, the assignee, the same as if the action were by Palmer, the payee. The plaintiff and defendant W. G. Palmer on July 18, 1904, the date of the deed and contract, were the owners in common of 11 quartz claims, each owning an undivided half thereof, but the title to most of them then stood in the name of Palmer and his wife. Three of them, in the first instance, belonged exclusively to Palmer, who had agreed to convey a one-half interest therein to Dr. Moore in consideration of the latter doing certain development work thereon. This contract Dr. Moore assigned to plaintiff, who, at the date of the deed and contract, claimed to have carried out fully and performed the terms thereof and to be entitled to a conveyance from Palmer of an undivided one-half interest therein, which claim the testimony clearly shows Palmer then conceded; but plaintiff then also claimed that he was to be reimbursed by Palmer the sum of \$3,500, as one-half of his expenditures made over and above the requirements of the Moore contract in developing and operating the mine. This latter claim Palmer now earnestly resists, but we are of the opinion that the evidence tends strongly to show that in negotiations for the sale of the mine, to be hereafter mentioned, Palmer also admitted and was willing to allow

the payment to plaintiff of that amount out of the proceeds of the mine when sold. Besides the three claims mentioned, eight others immediately adjoining were located by Palmer in his and his wife's names and in the name of plaintiff, all of which it was understood were to be the joint property of plaintiff and Palmer. The parties had failed to get any appreciable returns from the mine. Palmer was without means to assist further in operating or developing the mine or to make settlement with plaintiff for the past expenses claimed by him. At the same time Palmer was in pressing need of money to defray his family and other private expenses. For this reason, he desired to sell his interest in the mine, but plaintiff, having confidence in the ultimate success of the mine, did not wish to part with his interest, but was desirous of assisting Palmer in making a sale of his interest to some one financially able to assist in carrying on the development of the mine. This was the admitted situation and condition of the principals immediately prior to and at the time of the making of the note in question, and it is in the light afforded by this situation that the subsequent acts of the parties when making the deed and note are to be interpreted, and the intention of the parties ascertained.

About this time Stewart sought to purchase all of the mines, but Kramer, not desiring to sell, offered to purchase from Palmer his one-half of all the claims and water rights appurtenant thereto, and negotiations to that end were carried on between him and Palmer. On July 17, 1904, at Myrtle Creek, Douglas County, they agreed on the sum of \$12,500 as the price of the property, but were not able to conclude their bargain as to the times of payment. Stewart offered to pay \$3,000 in 30 days, \$3,000 in 12 months, and \$6,500 in 18 months, of which last payment \$3,500 was to reimburse the plaintiff for the excess of his share claimed by him of Palmer in the development of the mine. But Palmer wanted \$3,000 cash in hand or paid down on the conveyance of his interest, as his needs were pressing, and he could not well afford to wait 30 days for the first payment. It seems that Stewart was not prepared to meet this

demand, but assured the parties, Kramer being among them, that he could make arrangements to make the first payment in 30 days, and this was the best he could do in the premises, which necessarily prevented the direct consummation of the sale by the parties themselves, and, if brought about at all, must be accomplished through some other means or by the aid of some other party. And here is where the differences between the parties arose. Palmer contends that he broke off negotiations with Stewart, and then sold to plaintiff his interest for \$9,000, of which \$3,000 was paid at the time and the note given for the balance, while the latter claims that, to prevent the sale to Stewart from entirely failing, he, at Palmer's request, "took up the deal," advanced to him the much needed first payment of \$3,000, and gave him the note or contract sued on; that at the same time Palmer and his wife conveyed to plaintiff the whole of the mining property, one-half of which he was previously entitled to, and the other one-half to be sold to Stewart for the benefit of Palmer, and to pay himself the \$3,000 advanced and the \$3,500 claimed by him of Palmer.

It will be observed that the deed and the note were executed on the same day and constitute the written part of the transaction, and must be construed together, taken in connection with all the facts, incidents and circumstances which led to their execution, in order to determine the intentions of the parties which must control. The deed is absolute in form, but plaintiff claims that it is a mortgage. "The course of decisions in this class of cases," says ASHBURN, J., in *Stutz v. Desenberg*, 28 Ohio St. 371, 378, "indicates that courts are vigilant to discover whether a condition of defeasance in law or fact attaches to the deed absolute in form. To this end they scrutinize the prior pecuniary relations of the parties, each toward the other, contemporaneous acts bearing on the question, all after acts and admissions of the parties that are competent to be considered as evidence in relation to the transaction, any material inadequacy of consideration, and the terms of any written agreement entered into by the parties." Looking at the instru-

ments, the deed, and the note, they appear to be inconsistent with any intention of a sale as between Palmer and Kramer; at least they strongly support plaintiff's theory of a mortgage, as well as refute defendant's theory of a sale. An actual sale is the transfer of property from one person to another, and includes the actual and complete transfer of the title. A conditional sale of land is a purchase for a price paid or to be paid, to become absolute in the purchaser on the occurrence of a particular event, or it is a purchase accompanied by an agreement to resell to the grantor in a given time for a given price. While the deed in form is an absolute conveyance, yet the note, which is a part of the same transaction, contains a proviso to the effect that it is understood and agreed between Palmer and Kramer that the sum of money mentioned therein is payable only out of money arising from the sale of the property conveyed by the deed "or, in case of failure to consummate the sale of said mines now contemplated, then the money to be collectible only out of the proceeds of the sale of said claims."

The conditional words of the note clearly indicate that there were then negotiations for a sale of the property other than between Kramer and Palmer, and, if consummated, the property was to be conveyed to the purchaser, not named in the note, but clearly "understood and agreed" upon by Palmer and Kramer, and therefore identified and known. This "sale now contemplated," if "consummated," was to have the effect of taking the title out of Kramer and transferring it to the purchaser. This is inconsistent with the deed to Kramer, if construed as transferring the title absolutely to him. If a sale had been made to Kramer, he would have absolute dominion over it, with power to retain it or to dispose of it as he might see fit. No other person could sell the property, nor could any sale previously contracted to be made of the property by its owner take the title away from him. This indicates that Kramer was not holding the title as owner, but in some other capacity not disclosed by the note, and presumably not inconsistent with his conveying the property for the owner to some other person according to

an agreement between them. But, in case that sale is not "consummated," the condition provides that the amount of money named is "only to be collectible out of the proceeds of the sale of said claims." If the sale contemplated failed by default of the purchaser, then another purchaser was to be sought, and, if a sale was made, the same result as to payment applies in the last as in the first case. Now, as a sale of the property is contemplated by the note for its payment, and one already bargained for at the date of its execution and of the deed, and, in case of failure to complete it, then provision being made for another sale to have the same purpose, which would be after the execution of the note and deed, affords very strong, if not conclusive, proof that the deed to Kramer was not absolute, nor intended to be so by the parties to it, but that Kramer was to hold the title to serve some other purpose, understood by him and Palmer and not disclosed on the face of the note and requiring extraneous evidence to explain.

1. Recurring now to the testimony, and applying it to the wording of these instruments, as explained and discussed, to ascertain the real nature of the transaction, we find that on the day previous to the day on which the note and deed were made Palmer was negotiating with Stewart for the sale of his one-half of the mining property described in the deed. Kramer was present, and was assisting in furthering the negotiations, as it was to his interest to do so. The parties agreed upon the price, which was to be \$12,500. Stewart offered to pay \$3,000 in 30 days, \$3,000 in one year, and \$6,500 in 18 months, and out of this last payment Kramer was to be paid \$3,500 on account of his expenditures in the development of the mine. All this was satisfactory to Palmer, except he wanted the first payment to be cash in hand to meet his pressing personal needs, which, it seems, Stewart was not able to furnish. Stewart went so far as to examine the title to the property, and, finding the interests unequally divided between Kramer and Palmer, and a part in the name of Palmer's wife, he told them they must straighten out the title between themselves before he could proceed with

the sale; but he was expecting to complete the arrangement and provide the money at the time he named for the first payment, and evidently Kramer and Palmer so understood. Palmer swears he told Stewart the trade was off, and that he then sold to Kramer for \$9,000. But the terms of the note appear to contradict him on this point, for it speaks of a sale then contemplated, and no other contemplated sale is mentioned in the record than the one to Stewart. Nor does it appear to be reasonable that Palmer would break off a prospective sale at a price of \$12,500 and immediately resell to Kramer for \$9,000. The former makes no explanation why he reduced the price by that amount. Kramer denies that he bought the property or had any intention to buy, but he says that he left Stewart and Palmer talking together about the matter and went to his flouring mill; that a short time afterwards Palmer came to the mill and told him the differences between himself and Stewart, which were preventing the consummation of the sale, and asked Kramer "to take up the deal" with Stewart, as he (Kramer) could do better. Kramer agreed to do this, and the parties on the next day went to Grants Pass to conclude the arrangement. He also swears that at Palmer's request he advanced him \$3,000, the amount of the expected first payment from Stewart, depending upon this sale for his reimbursement of this money as well as for his former advances, amounting to \$3,500, and that he gave to Palmer the contract note mentioned in the pleadings as an evidence of Palmer's remaining interest in the expected purchase price of the mine, and took the deed to the property to secure a title to his one-half and to secure the repayment of these amounts out of Palmer's one-half. This explanation is consistent with the terms of the note. After a careful examination of all the testimony in the case, this appears to us to have been the purpose and intention of the parties in executing these instruments.

2. The equitable rule to be applied is that, when title to property is taken as security for indebtedness, loans or advances, a court of equity will declare the title to be held as a security, and the instrument, even though in the form of an absolute

deed, to be a mortgage, and in default of payment will foreclose the same as though it had been in form a mortgage in the first instance; and parol evidence is admissible to show that such deed or conveyance, although on its face purporting to be a deed, is in reality a mortgage, and the title held as security: *Hurford v. Harned*, 6 Or. 362, 363; *Stephens v. Allen*, 11 Or. 188 (3 Pac. 168); *Swegle v. Belle*, 20 Or. 323 (25 Pac. 633); *Adair v. Adair*, 22 Or. 115 (29 Pac. 193); *Lovejoy v. Chapman*, 23 Or. 571 (32 Pac. 687). To determine whether an instrument in form of a deed is in fact a mortgage, the test is the existence or non-existence of a debt at the making of the instrument; and, if there was, did the making of the instrument extinguish the debt after the execution of the instrument or instruments? 20 Am. & Eng. Ency. Law (2 ed.), 940. The contention is that the transaction was an absolute sale, but the conditions of the note, taken in connection with the testimony in the case revealing the circumstances under which the transaction was commenced and executed, preclude the idea of an actual sale. Nor was there a conditional sale, for there is no agreement to resell, nor an option to repurchase, as between Kramer and Palmer, for a given price within a given time. Hence we cannot but conclude that the deed was intended by the parties as a mortgage upon Palmer's one-half interest to secure Kramer for his claim of \$3,500, which was to be paid out of the proceeds of the sale of the mine and his advances of \$3,000 to Palmer at the time of the execution of the instruments, and that the note in question was to be paid only out of the remainder of the anticipated proceeds from the sale of the mine. Chancellor Kent says: "The test of the distinction is this: If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the parties * * and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitle himself to a reconveyance, it is a conditional sale": 4 Kent's Comm. 144, note. But in this case there is no option to repurchase, "no privilege, if he pleases, of refunding," but an obligation to liquidate a debt existing

before as well as one created at the execution of the instruments. The liability of Palmer for them remained, and was not discharged, as the evidence plainly discloses, showing that the relation of debtor and creditor did exist and continued, which brings the case squarely within the test applied.

3. By Section 5339, B. & C. Comp., it is provided:

"No mortgage shall be construed as implying a covenant for the payment of the sum thereby to be secured; and when there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage."

In this case, there being no bond or other separate instrument to secure the payment to plaintiff of the advances found to be due him, the relief granted to him must be confined to declaring the deed to be a mortgage upon Palmer's undivided one-half interest in the property described in the deed to secure the payment of \$6,500, with legal interest from the date thereof, and ordering a sale of the property, and after the payment of the costs and expenses of sale, and of the amount due plaintiff, the remainder, if any, be paid to defendant Wilson in full satisfaction and payment of the note in suit.

The decree of the lower court should be reversed and one entered here in accordance herewith.

REVERSED.

Argued 10 April, decided 28 May, 1907.

LAMBERT v. HOWARD.

90 Pac. 150.

FACTS SHOWING A MORTGAGEE IN POSSESSION—DUTY OF MORTGAGOR TO PAY MORTGAGE BEFORE RECOVERING POSSESSION.

1. Plaintiff mortgaged the property in controversy for its full value, and soon after moved from the state without paying any portion of the mortgage debt. She thereafter returned and occupied the premises with the mortgagee's consent for a short time, when she borrowed more money from the mortgagee and directed him to take possession in payment of the mortgage and the money so borrowed, which he did, thereafter paying taxes on the property, repairing fences, etc., and subsequently conveying to defendant. *Held*, that the mortgagee and defendant were mortgagees in possession, and that plaintiff, the mortgagor, was therefore not entitled to recover the property without paying the mortgage.

RIGHTS OF MORTGAGEE IN POSSESSION.

2. Although under Section 336, B. & C. Comp., a mortgagee cannot obtain possession of the mortgaged land by any legal proceeding except a foreclosure and sale, yet, once he has possession peaceably, he may retain it against the mortgagor until the mortgage debt has been paid.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by Mary J. Lambert against Della Howard to determine an adverse claim to real property. The plaintiff alleges that the land in controversy is unoccupied, that she is owner in fee thereof, and that defendant claims some estate or interest therein adverse to her, but that such claim is without right or validity, and prays that defendant be required to set forth the nature of her claim, etc. The defendant denies each and every material allegation of the complaint, and for an affirmative defense, alleges that on June 14, 1892, the plaintiff, being the owner of the premises in controversy, mortgaged the same to one Wm. Irwin to secure the payment of the sum of \$223.50 and interest; that thereafter plaintiff, without paying any part of the debt, removed from the state, and, before doing so, directed Irwin to assume possession of the mortgaged premises in payment of her debt; that accordingly Irwin went into possession about September 1, 1893, and so continued, under a claim of ownership, until February 28, 1902, when he sold and conveyed by warranty deed to defendant, who immediately went into possession, claiming to be the owner, and has ever since remained in possession; that plaintiff has not been seised or possessed of the property for more than 10 years prior to the commencement of this suit. The answer also sets up title through an alleged sale for delinquent taxes, but as such title is not relied upon by the defendant it need not further be alluded to. The averments of the answer were put in issue by the reply, and a trial had, resulting in a decree dismissing the suit on the ground that defendant is in the position of a mortgagee in possession and entitled to retain such possession until the mortgage debt is paid. From this decree plaintiff appeals.

AFFIRMED.

For plaintiff there was a brief over the names of *John Andrew Buchanan* and *R. W. Morsters*, with an oral argument by *Mr. Buchanan*.

For defendant there was a brief over the names of *C. L. Hamilton* and *James Corwin Fullerton*, with an oral argument by *Mr. Fullerton*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The decree, in our opinion, must be affirmed. On the pleadings and evidence the plaintiff has no standing in a court of equity and is not entitled to equitable relief. The record discloses that in 1892 she mortgaged the property in controversy to Wm. Irwin for its full value, and soon thereafter, without paying the mortgage or any part thereof, removed from the state, and has never since been in possession of the premises or exercised any dominion or control over them, except for a short time during the year 1896, when she occupied them by the consent of Irwin. The property was of but little value, unproductive and practically wild land, and it is undisputed that in 1893 Irwin assumed control and thereafter exercised actual dominion over it, repaired the fences, paid the taxes, and was the reputed owner until he sold and conveyed it to the defendant in 1902. The plaintiff claims that his possession was without her consent, but the weight of the testimony and the entire circumstances of the case are against her on that point. Irwin testified positively and unequivocally that just before she left she borrowed of him \$40, and directed him to take possession of the property in payment of the mortgage and the money so borrowed; and all his subsequent conduct is consistent with that theory. It is true the property was in possession of a tenant when plaintiff left the state, but the rent was to be paid to Irwin, and, when the lease expired, the tenant contracted with Irwin for a renewal thereof. Irwin never actually resided upon the property, and during much of the time he claimed to be in possession it was unoccupied, but he had continuous dominion over it, manifested by sundry acts of ownership, as renting it when he

could do so, paying the taxes, keeping the fences in repair and the like. This was sufficient to make him and his grantee mortgagees in possession (*Costello v. Edson*, 44 Minn. 135: 46 N. W. 299; *Coleman v. Billings*, 89 Ill. 183; *Webber v. Clarke*, 74 Cal. 11: 15 Pac. 431; *Ford v. Wilson*, 35 Miss. 490: 72 Am. Dec. 137), and the plaintiff is not entitled to relief in equity as against them without first doing equity herself by paying the mortgage.

2. While under our law a mortgagee cannot recover possession of the mortgaged premises without a foreclosure and sale according to law (B. & C. Comp. § 336), yet, if he obtains possession after condition broken, either by the assent of the mortgagor or by means of legal proceedings, he and his grantees may retain such possession as against the mortgagor until the amount due on the mortgage has been paid: *Roberts v. Sutherlin*, 4 Or. 219; *Cooke v. Cooper*, 18 Or. 142 (22 Pac. 945: 7 L. R. A. 273: 17 Am. St. Rep. 709).

Decree affirmed.

AFFIRMED.

Argued 28 March, decided 21 May, 1907.

MULTNOMAH COUNTY v. PORTLAND CRACKER CO.

90 Pac. 155.

TAXES—METHOD REQUIRED TO COLLECT—JURISDICTION OF EQUITY.

1. The method of collecting taxes prescribed by statute is the one that must be pursued by the public authorities for that purpose.

Where a statute requires the tax collector to return to the office of the county clerk a roll showing the uncollected taxes and directs that the clerk make therefrom a delinquent roll with a warrant to the tax collector to collect the sums thereon stated from the persons against whom they are assessed, the record thus provided for is exclusive, and the fact that extraneous memoranda or notations to the effect that the taxes have been remitted are allowed to be made on the record by strangers affords no reason why the clerk should not issue the delinquent warrant or the sheriff enforce it as directed, and a court of equity should not undertake to cancel such notations, for they are obviously void as they appear.

POWER OF COURT TO VACATE VOID ORDER OR JUDGMENT.

2. Courts of record have ample power to correct untrue statements in their records, and to vacate void orders and judgments, whenever the matters are brought to their attention.

JURISDICTION OF EQUITY—REMEDY AT LAW—MONEY JUDGMENT.

3. The rule that equity will retain control of a case and do full justice between the parties, even to a money judgment, after it has acquired juris-

diction on an equitable ground, cannot be invoked in a case where all the equitable grounds have failed—there the only questions before the court are legal and the law courts afford an adequate remedy.

In a suit to cancel alleged fraudulent entries on public records and to recover the amount of a tax which purported to be cancelled by such entries, the decree granting all the relief asked cannot be sustained as to the judgment for the tax where it appears that all the entries are either void on their face or have already been set aside by the court having control of the records, for the statutes afford sufficient means of collecting the tax without the intervention of a court of equity.

From Multnomah: JOHN B. CLELAND, Judge.

This is a suit by Multnomah County against the Portland Cracker Company. Defendant is a corporation, and in 1897 was the owner of personal property in Multnomah County, on which for that year a tax amounting to \$884 was assessed and levied. The tax roll which exhibited this tax was placed in the hands of the sheriff for collection of the taxes as required by law. The defendant failed to pay its tax, and the same became delinquent and was so returned by the sheriff. In April, 1901, the tax still being delinquent and no attempt to collect it having been made, the defendant sought to make a settlement with the county, being persuaded thereto by one Stimson, a deputy in the county clerk's office, to whom defendant paid \$250 for that purpose. Stimson converted the money to his own use, and fraudulently made an entry upon the tax records, purporting to show that this tax had been canceled by order of the county commissioners; and, without the knowledge of plaintiff, fraudulently interpolated in the commissioners' journal, under date of June 13, 1900, a fictitious and forged entry as follows:

"At this time it is ordered by the board that the assessment of personal property of the Portland Cracker Co. for 1897 be and hereby is canceled."

After stating the foregoing facts, plaintiff alleges in effect that Stimson had no authority to make either of such entries or to compromise any tax; that on August 7, 1903, the county court sitting at regular term for the transaction of county business set aside and annulled the false entry made in its journal, because it was made without consideration and was illegal; and that nevertheless, by reason of the fictitious, fraudulent and

forged entry in the commissioners' journal and the false entry in the tax roll, plaintiff is unable to collect its tax against defendant in the manner provided by law. A decree was asked annulling these entries, and for a personal judgment for the amount of the tax. Defendant answered, admitting its incorporation, the legality of the tax, its nonpayment, and that it became delinquent in 1898 and was so returned by the sheriff, but denied all other allegations. A trial was had, resulting in findings to the effect that the facts stated in the complaint were true; and, based thereon, a decree was entered declaring the entries on the tax roll and on the commissioners' journal to be void, and canceled the same, and awarding personal judgment against defendant for the amount of the tax, from which defendant appeals.

REVERSED.

For appellant there were oral arguments by *Mr. William David Fenton* and *Mr. Rufus Albertus Leiter*, with a brief to this effect.

I. The statutes of the state relating to the collection of taxes afford ample means for collecting what is due to the different counties—*Hill's Ann Laws*, §§ 2744, 2768, 2794 (with *Laws* 1893, p. 118), 2803-2834; and the mode so provided is exclusive of all other means of collection: *Crawford County v. Laub*, 110 Iowa, 355 (81 N. W. 590); *Plymouth County v. Moore*, 114 Iowa, 700 (87 N. W. 662); *Johnston v. Louisville*, 74 Ky. (11 Bush.) 527; *Carondelet v. Picot*, 38 Mo. 125; *State ex rel. v. Snyder*, 139 Mo. 549 (41 S. W. 216); *Camden v. Allen*, 26 N. J. Law, 399; *Freeholders v. Weymouth*, 68 N. J. Law, 652; *Brule County v. King*, 11 S. Dak. 294 (77 N. W. 107); *Hanson County v. Gray*, 12 S. Dak. 124 (80 N. W. 175; 76 Am. St. Rep. 594); *Board of Education v. Old, etc. Co.* 18 W. Va. 441; *State v. Baltimore & O. R. Co.* 41 W. Va. 81 (23 S. E. 677); *Pierce County v. Merrill*, 19 Wash. 175 (52 Pac. 854); *State v. Southwestern R. Co.* 70 Ga. 1; *Packard v. Tisdale*, 50 Maine, 376; *Crapo v. Stetson*, 49 Mass. (8 Met.) 393; *Raynsford v. Phelps*, 43 Mich. 342; *Faribault v. Misener*, 20 Minn. 396; *Richards v. County Com'rs*, 40 Neb. 45 (42 Am. St. Rep. 650; 58 N. W. 594); *Chamberlain v. Woolsey*, 66 Neb. 141 (92

N. W. 181); *Commissioners v. Faray* (Neb.), 99 N. W. 271; *Hibbard v. Clark*, 56 N. H. 155 (22 Am. Rep. 432); *McHenry v. Kidder County*, 8 N. Dak. 417 (79 N. W. 875); *State v. Piazza*, 66 Miss. 426.

II. Taxes are not debts and cannot be recovered by suit or action: *State v. Baker County*, 24 Or. 141, 145 (33 Pac. 530); *Lane County v. Oregon*, 74 U. S. (7 Wall.) 71; *Crabtree v. Madden*, 54 Fed. 431; *Jack v. Weinnett*, 115 Ill. 105 (56 Am. Rep. 129); *Loeber v. Leininger*, 175 Ill. 484 (51 N. E. 703); *McKeesport v. Fidler*, 147 Pa. 532; *Du Bignon v. Brunswick*, 106 Ga. 325 (32 S. E. 102); *Gallup v. Schmidt*, 154 Ind. 215 (56 N. E. 443).

III. Where a statutory remedy is provided, it must be followed and an action at law to recover the tax cannot be substituted for it: *Marye v. Diggs*, 98 Va. 749 (51 L. R. A. 902); *Baldwin v. Hewitt*, 88 Ky. 673; *Louisville Water Co. v. Commonwealth*, 89 Ky. 244; *Detroit v. Jepp*, 52 Mich. 458; *Commissioners v. Bank*, 48 Kan. 561 (30 Pac. 22); *Hanson County v. Gray*, 12 S. Dak. 124 (80 N. W. 175; 76 Am. St. Rep. 594); *Crisman v. Reich*, 2 Utah, 111.

Nor can a suit in equity be maintained under such circumstances: *Pierce County v. Merrill*, 19 Wash. 175 (52 Pac. 854); *Montezuma Water Supply Co. v. Bell*, 20 Colo. 175 (36 Pac. 1102); *Finnigan v. Fernandina*, 15 Fla. 379 (21 Am. Rep. 292); *Commissioners v. Murphy*, 107 N. Car. 36 (12 S. E. 122); *People v. Biggins*, 96 Ill. 485. Sometimes an action is provided for by the statute: *Shearer v. Citizens' Bank*, 129 Iowa, 564 (105 N. W. 1025).

IV. The remedy provided by statute is the normal one and should be exhausted before resorting to the courts: *Commissioners v. Murphy*, 107 N. Car. 36 (12 S. E. 122); *State v. Piazza*, 66 Miss. 426, 430; *State v. Baltimore & O. R. Co.* 41 W. Va. 81 (23 S. E. 677).

For respondent there were oral arguments by *Mr. John Manning*, District Attorney, and *Mr. Charles Henry Carey*, with a brief to this effect.

1. Every person is presumed to know the nature and extent of the powers of public officials and therefore cannot be deemed to have been deceived or misled by acts done without legal authority: 1 Beach, Pub. Corp. §§ 195, 202, 221, 241-243, 626 and 628.

2. The attempted compromise of the tax by the deputy county clerk was not within the scope of his authority and was void: B. & C. Comp. § 1008; Title III, Chap. 12, 2 Hills' Ann. Laws, p. 1144, et seq.

3. The county, in the exercise of its corporate functions, is endowed with sovereign power, without limitation or restriction other than such as might be invoked against the state: *Seton v. Hoyt*, 34 Or. 266 (43 L. R. A. 634: 75 Am. St. Rep. 641: 55 Pac. 967).

4. The right of the state to maintain a suit or action for the enforcement of an obligation is not of statutory origin, but is an attribute of sovereignty, and the fact that the legislature has provided a remedy does not prevent the county (which has the same power that the state has) from exercising this inherent power: *Dollar Sav. Bank v. United States*, 86 U. S. (19 Wall.) 227; *State v. Georgia County*, 112 N. Car. 34 (17 S. E. 10: 19 L. R. A. 485); *People v. Seymour*, 16 Cal. 332-344.

5. Under Section 2518, B. & C. Comp., the county may maintain a suit for the correction of its records, and, under the general principles of equity, when the court has acquired jurisdiction for one purpose, it will retain jurisdiction for all purposes: *Pomeroy*, Eq. Juris. (3 ed.), §§ 181 and 231-242.

Opinion by MR. COMMISSIONER SLATER.

The facts as found by the lower court are not challenged by counsel for defendant, but they contend that, as a matter of law, the facts alleged and found are not sufficient to support the decree, and we are of the opinion that this contention is correct. The plaintiff argues in support of the jurisdiction of the court that this suit was brought primarily, not to collect a tax, but to cancel a false record which prevented it from collecting the tax through the statutory method, and that the additional relief

sought is ancillary to the main or primary purpose of the suit on the familiar principle that, when equity takes cognizance of a case for any purpose, it will administer complete relief between the parties; but, in our opinion, if the primary jurisdiction contended for fails, the ancillary relief sought must necessarily be denied.

1. It is a familiar and well-established rule that a court of equity will not exercise its jurisdiction when the instrument or record sought to be canceled is void upon its face: 4 Pomeroy, Equity (3 ed.), §§ 1377, 1399. The entry made by Stimson on the delinquent tax roll consisted of these words, "Canceled Order Board Co. Commrs.," written at the end of the line on which defendant's name and the amount and details of its tax were written, and under the heading "By whom paid." The precise time this was written thereon is not disclosed, but it is certain that it was after the delinquent roll was delivered by the sheriff to the clerk and while in the latter's official custody. The delinquent tax roll is a public record, comprising a statement of taxes remaining unpaid, to be made by the sheriff according to the requirements of Section 2809, Hill's Ann. Laws 1892, then in force, and to be by him delivered to the county court. The statute particularly describes what information it shall contain. When made and delivered it is a complete public record, and no power or authority is vested by statute in any person or tribunal to make any changes therein or add anything thereto: *Burness v. Multnomah County*, 37 Or. 460 (60 Pac. 1005). Whatever the county court may lawfully order done in respect to taxes due from a taxpayer should be entered in its journal required by law to be kept for that purpose, and no minute or memorandum thereof made elsewhere without any authority of law has any legal force or effect. The entry in question was not of the character of any of the items required by Section 2809, Hill's Ann. Laws 1892, to be entered by the sheriff in the delinquent tax roll, and was void upon its face. It never was in law a part of the delinquent tax roll or, at the utmost, anything more than a private memorandum, which could not in any way have con-

trolled or affected the action of any officer of the county in performing his official duties involved in the collection of this tax in the manner required by law. Section 2814, Hill's Ann. Laws 1892, then in force, required the county clerk to

"Make from said delinquent tax roll a true and correct list of the taxes returned as unpaid, and a correct description of the lands or town lots, if the same can be made, and to whom such taxes are charged, and deliver the same to the sheriff of the county, with a warrant attached thereto," etc.

It will be observed that the clerk must make a list "of the taxes returned as unpaid" by the sheriff. He could not do less by leaving out the tax of one or more, but must include all. At least an unauthorized memorandum made upon the delinquent roll, as in this case, could not stay his hand.

2. Nor can the jurisdiction of a court of equity be invoked to cancel of record the admittedly false and forged entry in the commissioners' journal respecting this tax. It is a record of the official acts and orders of the county court when transacting county business, and, like the record of any other court, is subject to correction and amendment by that court within the salutary limitations recognized by law. "A judgment void upon its face," says Mr. Justice WOLVERTON, in *White v. Ladd*, 41 Or. 324 (68 Pac. 739: 93 Am. St. Rep. 732), "may be set aside or vacated at any stage of the proceedings, or at any time, whether within the term at which it was rendered or afterwards, when the attention of the court in which it was rendered is attracted to it. Such a judgment, it has been said, 'is a dead limb upon the judicial tree, which should be lopped off. * * It can bear no fruit to the plaintiff, but it is a constant menace to the defendant.' This power is inherent with the court, and will be exercised, even at its own suggestion, for the preservation of its dignity, the protection of its officers, and to arrest further action which can serve no lawful purpose, and the most effectual method is by extirpation of the judgment itself as superfluous and vexatious: *Evans v. Christian*, 4 Or. 375; *Ladd v. Mason*, 10 Or. 308; *People v. Greene*, 74 Cal. 400 (16 Pac. 197: 5 Am. St. Rep.

448); *Lee v. O'Shaughnessy*, 20 Minn. 173 (Gil. 157); *Hanson v. Wolcott*, 19 Kan. 207." On August 7, 1903, and nearly six months before the commencement of this suit, the County Court of Multnomah County, sitting for the transaction of county business at a regular term thereof, made an order setting aside and annulling the order hereinbefore mentioned. The action of the court in thus purging its record of the forged entry was within its power, and there was nothing left upon the record, if there ever was anything thereon, to hinder or prevent the county officers from proceeding according to the statute to collect this tax.

3. It is stated in the complaint that, because of the alleged fraudulent entries, the plaintiff cannot collect the tax in the manner provided by law, implying that, if these alleged obstacles were removed, the tax could be collected in the usual manner; nor is there any other fact alleged which might tend to establish and support the jurisdiction of a court of equity in giving its aid to collect this tax. The rule that a court of equity obtaining jurisdiction of a cause for one purpose will retain it until complete justice is administered can have no application to this case; for, the jurisdiction being dependent upon the alleged necessity to correct a record which, in one instance, was not a record at all and was void upon its face, and, in the other instance, had been canceled by a competent court before the commencement of this suit, the court was powerless to render a money judgment for the amount of the tax: *Phipps v. Kelly*, 12 Or. 213 (6 Pac. 707); *Ming Yue v. Coos Bay R. Co.* 24 Or. 392 (33 Pac. 641); *Stemmer v. Scottish Ins. Co.* 33 Or. 65 (49 Pac. 588, 53 Pac. 498); *Denny v. McCown*, 34 Or. 47 (54 Pac. 952).

It follows that the decree should be reversed and the suit dismissed.

REVERSED.

Argued 13 January, decided 12 February, rehearing denied 26 March, 1907.

BAXTER v. STATE.

33 Pac. 677, 89 Pac. 369.

INTOXICATING LIQUORS—CONSTRUCTION OF LOCAL OPTION LAW AS TO ELECTIONS IN AN ENTIRE COUNTY.

1. Section 10 of the local option law of 1905 (Laws 1905, pp. 41, 47), providing that a petition for an election in any county shall be effective as a petition for an election in each individual precinct in such county, and the county court shall issue an order of prohibition for each and every precinct in the county voting for prohibition, though the county as a whole votes against prohibition, means that the vote in each precinct, though cast in an election throughout the county, stands as a vote on the liquor question in that precinct without regard to the rest of the county, as well as a part of the vote on prohibition in the county at large, and is constitutional and valid.

INTOXICATING LIQUORS—CRIMES—AMENDMENT OF CITY CHARTERS.

2. The local option act of 1905, where it provides for prohibiting the selling of liquor and punishing those who do sell in violation of the order of the county court, is a general criminal statute, and therefore within the exception to Section 2 of Article XI of the Constitution of Oregon, as amended in 1906. Since that amendment cities, though having the right to enact and amend their own charters, are still subject to the prohibition order of the county court, and can neither enact nor amend so as to escape the effect of such an order.

INTOXICATING LIQUORS—EFFECT OF COUNTRY VOTE ON SALES IN CITIES.

3. A vote for prohibition in any subdivision of territory provided by statute controls throughout that entire district, regardless of the boundaries or regulations of smaller divisions that may be included therein; for instance, a prohibition vote in a precinct that includes an incorporated town is controlling on such town.

INTOXICATING LIQUORS—EFFECT OF VOTE FOR PROHIBITION ON CHARTER PROVISIONS AUTHORIZING ISSUANCE OF LICENSES.

4. The effect of Section 12 of the local option law of 1905, providing that if the election goes dry no election on that subject shall be held again in that district within two years, is simply to modify the charters of cities within the district which have provisions authorizing the licensing and regulating of sales of liquor so long as the dry spell continues. It does not suspend the charters, but puts a limitation for an indefinite period on certain of their provisions.

INTOXICATING LIQUORS—CONSTRUCTION OF LOCAL OPTION ACT WHERE PROHIBITION PREVAILS WHOLLY OR PARTIALLY.

5. Under Section 8 of the local option law (Laws 1905 c. 2, pp. 41, 45), prescribing the form of ballot for a local option election for an entire county as well as for subdivisions thereof, and Section 10, providing that where a majority of the votes in the county as a whole or in any subdivision thereof are for prohibition the court shall make an order prohibiting the sale of liquors therein, etc., if prohibition is adopted by a

county as a whole, it must be applied to the entire county though a precinct therein voted against prohibition, and if prohibition is rejected by a county as a whole, still it must be applied to a precinct therein adopting prohibition.

From Coos: GEORGE H. BURNETT, Judge.

George E. Baxter was convicted before a justice of the peace of selling liquor without a license, in violation of the local option law, which judgment was affirmed by the circuit court on a stipulation of facts, from which defendant appeals. Prior to the June election of 1906, a petition was filed with the county clerk of Coos County asking that the question, "Shall intoxicating liquors for beverage purposes be prohibited in said county as a whole?" be submitted to the voters of Coos County, Oregon, at the June election of 1906, and the ballot used at said election submitted the question to the voters in the following words, viz.:

"Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for the entire County of Coos."

The vote upon the question as stated in the ballot gave a majority of 132 votes in the county against prohibition; but in West Coquille Precinct, in which the appellant's saloon was situated, the vote on that question as stated upon the ballot gave a majority of 12 votes for prohibition. The City of Coquille is an incorporated city, situated in West Coquille Precinct, and said precinct contains territory and voters not within the city. In August, 1906, after the general election of June, 1906, the City of Coquille, by a vote of its citizens under the provisions of Section 2 of Article XI of the constitution, as amended in June, 1906, amended Subdivision 7 of Section 2 of Article IV of its charter, thereby authorizing it to license saloons, and the act of appellant complained of was by authority of such a license in said city.

The case was submitted on briefs, under the proviso of Rule 16: 35 Or. 587, 600.

AFFIRMED.

For appellant there was a brief over the names of *Austin S. Hammond* and *Sperry & Chase*.

For the State there was a brief over the name of *George M. Brown*, District Attorney.

MR. JUSTICE EAKIN delivered the opinion of the court.

Two principal questions are involved herein on this appeal, viz.: (1) Where the question of prohibition in a county as a whole was submitted to the voters, is the law valid and constitutional wherein it authorizes the county court to issue an order of prohibition for a precinct in the county so voting for prohibition, notwithstanding the county as a whole voted against prohibition? And (2) if so, does Section 2 of Article XI of the constitution as amended authorize a city within such precinct to so amend its charter as to avoid the prohibition order of the county court?

1. Section 10 of the local option law (Laws 1905, p. 47) provides, among other things:

"A petition for an election in any county * * shall be considered as and shall have the effect of a petition for an election in each individual precinct in such county * * and the county court shall issue an order of prohibition for each and every precinct in the county voting 'For Prohibition,' notwithstanding the county as a whole * * voted 'Against Prohibition.'"

The effect of this language is that the vote in each precinct, even on a vote cast for the county as a whole, shall stand as an independent vote for that precinct for prohibition therein, as well as a part of the county vote on prohibition in the county as a whole. In *Smith v. Patton*, 20 Ky. Law Rep. 165 (45 S. W. 450), it was objected that the ballot did not propound to the voter the question whether druggists should be licensed to sell liquors or not, and the court holds that the requirements of the statute had been complied with, and that "the voters must be presumed to have known what they were voting for." And, being a provision of the law itself, the vote is deemed to be cast with reference thereto, as though mentioned on the ballot separately, and is presumed to be in contemplation of the voter when he casts his vote. The law is valid and constitutional in authorizing such a prohibition order by the county court.

2. The amendment of Section 2 of Article XI of the constitution, adopted in June, 1906, provides:

"The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

The appellant insists that by this amendment the city can enact or so amend its own charter as to exempt the city from the terms of the local option law, claiming that the local option law does not create a crime within the meaning of the amendment. The amendment does not affect the right of the legislature or of the people by the initiative to enact any law they deem proper affecting the criminal laws of the state, and changes therein and new criminal laws will apply to the cities regardless of their charters; and the question is whether the local option law is a criminal law within the meaning of this amendment to the constitution. For the purpose of this decision we assume, without deciding, that the amendment of Section 2 of Article XI of the constitution is self-executing, as that question was not raised in this court. Section 1228, B. & C. Comp., defines a crime, and it includes both felonies and misdemeanors, and any offense, either felony or misdemeanor, defined and made punishable by general statute, is one to which the municipal charters are subject. In *Portland v. Erickson*, 39 Or. 6 (62 Pac. 753), it is held in effect that where, under a statute or ordinance, the enforcement of which is provided for by complaint and warrant and where the punishment provided may be fine or imprisonment, or imprisonment aside from the pecuniary penalty, such a proceeding is so far criminal in its nature, and a violation of the statute is such an offense, that it is within the terms of Sections 11 and 12 of Article I of the constitution. And the only additional requisite, under Section 2 of Article XI, is that it be a general law of the state.

But the appellant insists that the local option law is of only local operation, and not general, and for that reason cannot be deemed criminal within the meaning of the constitution. The law purports to be a general law and took effect upon the proclamation of the Governor, and only its application in a particular locality is made to depend upon the vote of that locality; and

thus it is a uniform law throughout the state. In Elliott on the Elements of Municipal Corporations, § 60, referring to local option laws, it is said: "If the law is complete when it comes from the hands of the legislature, it is a general law operative throughout the state." To the same effect are *State v. Pond*, 93 Mo. 606 (6 S. W. 469), and *Paul v. Gloucester County*, 50 N. J. Law, 585, 607 (15 Atl. 272: 1 L. R. A. 86). In *Fouts v. Hood River*, 46 Or. 492 (81 Pac. 370: 1 L. R. A., N. S., 483), it is held that "the crime of misdemeanor prescribed or created for a violation of the prohibition order is alike and uniform all over the state." And it is clearly a general law of the state, and comes within the exception in the amendment of Section 2 of Article XI of the constitution, and controls in cities in which it is made applicable by vote.

3. The appellant also insists that, the precinct being larger than the city limits, a few country votes may control the city on the question of prohibition, and thus affect matters of taxation within the city by depriving it of a business that might produce large revenue. But this argument has no greater force in the case of a precinct than in the case of a county as a whole. In *Smith v. Patton*, 20 Ky. Law Rep. 165 (45 S. W. 450), where it was objected that the City of Somerset should not be bound by the votes of the county outside its territorial limits, the court holds otherwise; and to the same effect, also, are *Cole v. Commonwealth*, 101 Ky. 151 (39 S. W. 1029); *Tatum v. State of Georgia*, 79 Ga. 176 (3 S. E. 907), and *Garrett Blanks v. Mayor*, 47 La. Ann. 618 (17 South. 238). And the state, a county, or a part of a county, may prohibit such business within its territory, and a city has no ground of complaint.

4. It is also claimed by the appellant that the application of the local option law in any locality is a suspension of the city charter relating to the licensing of the sale of intoxicating liquors, in violation of Section 2 of Article XI of the constitution; but in *Sandys v. Williams*, 46 Or. 327, 332 (80 Pac. 642), it is held that the local option law is a new statute relating to intoxicating liquors, and "was not intended as a substitute for

the earlier law, but only as a modification thereof when its provisions become applicable to a specified district." In other words, the city charter and the local option law must be read together. Subdivision 7 of Section 2 of Article IV of the city charter now has one proviso, viz., that no license for the sale of spirituous liquors shall be granted by the common council for a less sum than \$600 per annum, and it should not be read as though it had another proviso, viz., that no license for the sale of spirituous, malt or vinous liquors for beverage purposes shall be granted in cases where an order of prohibition has been issued for that locality by the county court pursuant to the provisions of the local option law. If prohibition is not adopted in that locality or precinct, then the charter controls in matters of licensing saloons, and if prohibition is in force in the locality under the local option law, then no license can issue while so in force. By Section 12 of the local option law it is provided that, if the result of the vote in any precinct is for prohibition, no election thereunder shall be held within such prohibited district (except as to the county as a whole) before the first Monday in June of the second calendar year thereafter. In other words, that vote is final in the territory affected thereby, and cannot be changed, except by another election under the local option law, and this constitutes a limitation upon the city charter and the powers of the city within such territory. But, say the court in *Sandys v. Williams*, "a majority vote for prohibition * * under the local option law is tantamount to a remonstrance against the granting of a license by the county court, thereby preventing the sale of intoxicating liquors in any precinct in the designated district until the vote has been regularly changed at a subsequent election, so as to be against prohibition. * * The refusal of a license in an incorporated town or city, in pursuance of a majority vote for prohibition, under the provisions of the local option law, is a modification of the prior acts generally applicable to municipal corporations." And this applies equally to charters amended under Section 2 of Article XI of the constitution, and therefore does not authorize a city to so amend

its charter as to avoid the prohibition of the county court authorized by the local option law.

There being no error in the proceedings of the lower court, the judgment is affirmed.

AFFIRMED.

Decided 26 March, 1907.

ON MOTION FOR REHEARING.

MR. JUSTICE EAKIN delivered the opinion of the court.

5. Attorneys for the plaintiff have filed a motion for a rehearing in this case, claiming that contentions of the plaintiff have been overlooked by the court; for instance, that "the local option law does not, as it stands, authorize a county court to issue an order of prohibition for a precinct when there has been no separate vote upon precinct prohibition and the county as a whole has voted 'wet.'"

Section 8 of the act (Laws 1905, pp. 41, 45) provides what the ballot shall contain, as follows:

"For said election it shall be the duty of the county clerk or the proper city authority, as provided in Section 3 of this act, to arrange the ballots and have them printed in substantially the following form:

Ballot for — precinct, — county (date of election).

1. Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes, for entire county of —.

Mark X between number and answer voted for.

12 For Prohibition.

13 Against Prohibition.

If an election has been called for the entire county and for no subdivisions thereof, then this form shall be substantially used for each precinct.

2. If an election has been called for a subdivision or subdivisions as well as for the entire county, then the words 'Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for the entire county of — and for subdivision of — county, consisting of precincts numbered (or named) —,' shall be substituted in the form for the words, 'Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for the entire county of —,'

for those precincts situated within the respective subdivisions.

3. If no election shall have been called for the entire county and only for subdivisions thereof, then the words 'Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for subdivision of — county consisting of precincts numbered (or named) —,' shall be substituted in the form for the words, 'Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for entire county of —,' for the precincts within the respective subdivisions.

4. If no election shall be called for the entire county, then for those precincts desiring to vote on the question and not included in any subdivision, the words, 'Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for — precinct only of — county,' shall be substituted in the form for the words, 'Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for entire county of —.' "

This section defines and prescribes the form of ballot, and no other is permissible. The clerk, therefore, cannot, on either of the first two forms, arrange for a separate vote as to an individual precinct contained in such territory. Where the ballot provides for a vote as to the county as a whole, it may also, as part of the same form or item, provide for a vote as to a subdivision of the county composed of more than one precinct, but not as to a separate precinct, and in such a case only one answer or vote is permissible as to the whole question or item. For instance, the form will be:

"Vote for or against prohibition of the sale of intoxicating liquors for beverage purposes for the entire County of Coos and for subdivision of Coos County, consisting of precincts named West Coquille and Bandon.

Mark X between number and answer voted for.

12 For Prohibition.

13 Against Prohibition."

If no election shall have been called for the entire county and only for a subdivision thereof, the form of ballot cannot provide for a separate vote as to a particular precinct included in such subdivision (but provision may be made on the ballot for a vote as to a precinct not included in such subdivision, if an election has been ordered for such precinct). When either of the first

two forms of ballot is used, no precinct included in such territory can have a separate vote upon precinct prohibition, but each precinct in its own territory is considered as though named on the ballot, and one vote or answer applies to both the county and the precinct, as is expressly the case under the second form of ballot for the county and a subdivision. This is clearly shown by Section 10 of the act, which declares the effect of the vote and prescribes the duty of the county court in reference thereto. It provides:

"If a majority of the votes hereon in the county as a whole, or in any subdivisions of the county as a whole, or in any precinct of the county, are 'For Prohibition,' said court shall immediately make an order * * prohibiting the sale."

This provision has reference to the result of the vote as to the territory expressly mentioned in the ballot. Thereafter this same section declares:

"A petition for an election in any county or subdivision thereof shall be considered as and shall have the effect of a petition for an election in each individual precinct in such county or subdivision thereof, and the county court shall issue an order of prohibition for each and every precinct in the county voting 'For Prohibition,' notwithstanding the county as a whole and the subdivision (if any) as a whole voted 'Against Prohibition.'"

This clause provides expressly for the prohibition order in precincts in which there can be no separate vote on precinct prohibition, and the act is not inconsistent in that it does not provide for a license within precincts voting against prohibition when the county as a whole voted for prohibition. Where prohibition is adopted by the county as a whole, it is the adoption of a policy of county government, and as such must be applied to the entire county, even though a precinct therein votes against it; but where a county as a whole votes against prohibition, it has thereby adopted no measure or policy for the county by its vote; it has only said that it will not adopt prohibition for the county as a whole; and, if a precinct in such case does adopt prohibition, it will not be in conflict or inconsistent with the county vote.

The petition is denied. AFFIRMED: REHEARING DENIED.

Argued 11 April, decided 21 May, 1907, rehearing denied.

KEEN v. KEEN.

10 L. R. A. (N. S.), 504; 90 Pac. 147.

APPEAL—SUFFICIENCY OF ABSTRACT.

1. An abstract of the record is sufficient if it shows enough of the proceedings to enable the court to pass upon the questions presented, which was the case here.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS.*

2. Since the enactment of Section 5250, B. & C. Comp., removing all civil disabilities on a wife that do not exist as to the husband, and granting her in her own name alone the same right to appeal to the courts for redress that her husband has, a married woman may maintain in Oregon an action for the alienation of her husband's affections.

ALIENATION OF HUSBAND'S AFFECTIONS—EFFECT OF WIFE'S DIVORCE.

3. A wife's right to damages for alienating her husband's affections is not affected by obtaining a divorce from him after the alienation and consequent desertion.

TRIAL—INVADING PROVINCE OF JURY.

4. The jury being the exclusive judges of the facts under Section 139, B. & C. Comp., trial courts must refrain from remarks that may be construed as expressing a conclusion or inference from the evidence.

In an action by a wife for the alienation of her husband's affections, the court, in overruling an objection to evidence tending to show that plaintiff's husband had sought the affections of defendant, stated that he did not think it made any difference, as his experience and observation had been that a woman "is not liable to be seduced without she contributes a little in some way to the general purposes of the case." Subsequently an instruction was given to the effect that if the jury believed that plain-

*NOTE.—On this subject see the following cases: *Bennett v. Bennett*, 6 L. R. A. 553 (with briefs and note); *Foot v. Card*, 6 L. R. A. 829 (with briefs): 18 Am. St. Rep. 258; *Duffes v. Duffes*, 8 L. R. A. 420 (with briefs): 20 Am. St. Rep. 79; *Doe v. Roe*, 8 L. R. A. 833: 17 Am. St. Rep. 499, 500 (with note); *Warren v. Warren*, 14 L. R. A. 545 (with briefs), *Haynes v. Nowlin*, 14 L. R. A. 787 (with briefs): 28 Am. St. Rep. 213 (with note); *Clow v. Chapman*, 26 L. R. A. 412 (with briefs): 46 Am. St. Rep. 468 (with note, 472-478); *Hodgkinson v. Hodgkinson*, 27 L. R. A. 120 (with briefs): 47 Am. St. Rep. 759; *Price v. Price*, 29 L. R. A. 150 (with briefs): 51 Am. St. Rep. 360; *Brown v. Brown*, 38 L. R. A. 242 (with briefs); *Gerner v. Gerner*, 40 L. R. A. 549: 64 Am. St. Rep. 646, 649 (with note); *Beach v. Brown*, 43 L. R. A. 114 (with briefs): 72 Am. St. Rep. 98; *Seaver v. Adams*, 49 Am. St. Rep. 597; *Reed v. Reed*, 51 Am. St. Rep. 310; *Smith v. Smith*, 60 Am. St. Rep. 838; *Betser v. Betser*, 78 Am. St. Rep. 303: 52 L. R. A. 630 (with briefs). For very complete collections of authorities, see *Fratini v. Caslini*, 49 Am. St. Rep. 843 (with note 845-852); *Adams v. Main*, 50 Am. St. Rep. 266; *Oakman v. Beiden*, 80 Am. St. Rep. 396; *Callis v. Meriwether*, 103 Am. St. Rep. 404; *Nolin v. Pearson*, 114 Am. St. Rep. 605: 4 L. R. A. (N. S.) 643 (with note): 6 A. & E. Ann. Cas. 658 (with note, 661-666); *Morris v. Warwick*, 7 A. & E. Ann. Cas. 687, with note.

tiff's husband made advances toward defendant, and she merely received them passively, and gave no active encouragement, the verdict must be for defendant, and that the mere fact that a man became infatuated with a woman and fell in love with her did not furnish a ground of action against her. *Held*, that the remark was error, under B. & C. Comp., § 783, providing that an inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect, and Section 139, providing that in charging the jury the court must not present the facts of the case, but inform the jury that they are the exclusive judges of the facts.

From Washington: THOMAS A. MCBRIDE, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by Della B. Keen against Susan Keen to recover damages. The complaint states, in effect, that for many years prior to November, 1903, the plaintiff and William B. Keen were husband and wife, and lived happily together; that in the years 1902 and 1903 the defendant, wrongfully and maliciously intending to injure the plaintiff and to alienate her husband's affections, persuaded him to leave his home and to reside with the defendant; that thereafter their conduct became so notorious and scandalous that the plaintiff secured a divorce from him in November, 1903, in the Circuit Court of the State of Oregon for Washington County, and, after the expiration of six months from the granting of the decree dissolving the marriage contract, he intermarried with the defendant, and they now are husband and wife; and that by reason thereof the plaintiff has been deprived of his society and support, and has also suffered great distress of body and mind, to her damage in a specified sum. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was overruled, whereupon an answer was filed denying the material allegations of the complaint. The cause was tried, and a verdict for \$3,000 in plaintiff's favor was returned, and, judgment having been entered thereon, the defendant appeals.

REVERSED.

For appellant there was a brief over the names of C. W. Miller and Samuel Bruce Huston, with an oral argument by Mr. Huston.

For respondent there was a brief over the names of *Spencer & Davis* and *H. F. Bagley*, with an oral argument by *Mr. Wilfred Edgar Farrell*.

Opinion by MR. JUSTICE MOORE.

1. As a preliminary matter, the plaintiff's counsel move to dismiss the appeal, on the ground that the printed abstract, which is used in lieu of a transcript, is insufficient to present the errors relied upon for a reversal. The statute permits an appellant to file such an abstract of the record of a cause as the rules of the appellate court may require (B. & C. Comp. § 553), and, as the abridgement in the case at bar is a sufficient compliance with the requirements of this court, the motion must be denied: *Backhaus v. Buells*, 43 Or. 558 (72 Pac. 976, 73 Pac. 342).

2. It is insisted by defendant's counsel that the right of a married woman to maintain an action for the alleged alienation of her husband's affection did not exist at common law, and has not been conferred by our statute, and, this being so, an error was committed in overruling the demurrer. The following enactment, relating to the rights of a married woman is in force in this state:

"All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed: Provided, that this act shall not confer the right to vote or hold office upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has": B. & C. Comp. § 5250.

Mr. Bishop, in his *Law of Married Women* (Section 279), in speaking of the effect of such legislation, says: "It is plain in reason that, if a statute simply gives to the wife the authority to 'sue and be sued,' without the joinder of her husband, this alone will enable her to maintain in her own name an action for a simple tort affecting her person or reputation, because the suffering and injury are hers, and the only obstacle to her maintaining the action under the common-law rules is her incapacity

to appear in court without her husband." In *Haynes v. Nowlin*, 129 Ind. 581 (29 N. E. 389; 14 L. R. A. 787; 28 Am. St. Rep. 213), in construing a statute authorizing the wife to sue alone, it was held that she could maintain an action against one who wrongfully enticed her husband from her and alienated his affections. In deciding that case, Mr. Chief Justice ELLIOTT, commenting upon the boast of the common law that "there is no right without a remedy," says: "It seems to us very clear that, in view of the facts that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her." In a few of the states it has been ruled by the courts of last resort that such an action cannot be maintained; but, where modern legislation recognizes the doctrine that the wife has rights which courts should respect, reason and the great weight of authority uphold the principle that for the loss of consortium, which includes the husband's society,* love and assistance, the law now affords her an adequate remedy. The plaintiff's counsel herein cite the case of *Waldron v. Waldron* (C. C.), 45 Fed. 315, which was an action by a divorced woman for alienating the affections of her husband, wherein she secured a verdict. The judgment rendered thereon was reversed on appeal, however, on the ground that improper evidence had been admitted over objections, and that an assertion had been made in argument by counsel of facts of which no evidence was properly before the jury, to which exceptions were taken: *Waldron v. Waldron*, 156 U. S. 361 (15 Sup. Ct. 383; 39 L. Ed. 453).

3. In *Postlewaite v. Postlewaite*, 1 Ind. App. 473 (28 N. E. 99), it was decided that a divorced woman might maintain an action for the alienation of the affections of her former husband. So, too, in *Beach v. Brown*, 20 Wash. 266 (55 Pac. 46; 43 L. R. A. 114; 72 Am. St. Rep. 98), it was held that a wife's right of action for damages for the alienation of her husband's affections was not lost by reason of her obtaining a divorce from

him. We conclude, therefore, that no error was committed in overruling the demurrer.

4. W. B. Keen, as defendant's witness, was interrogated on cross-examination as follows:

"I will ask you to state if at the time that you and Susan Reynolds (it was then) and Frank Burton and Sadie Keen came to Portland, as you have described, if you were not the one that insisted that Susan Reynolds should sit with you?"

To which the witness replied:

"No, sir.

Q. And you insisted upon her sitting on the front seat with you, and she had gotten on the back seat, and you insisted that she get over on the front seat with you?"

An objection to this question, on the ground that it was irrelevant and immaterial, having been interposed, the defendant's counsel observed that his client was charged with having alienated the affections of William Keen, and that the accusation could not be substantiated by evidence which tended to show that Keen had sought the society and affections of the defendant. Thereupon, the court, in overruling the objections, said, in the presence of the jury:

"I don't think it makes any difference in this case. The charge is that she seduced him. My experience has been, my observation has been, that a woman is not liable to be seduced without she contributes a little in some way to the general purposes of the case."

An exception to this remark having been reserved, it is contended by defendant's counsel that an error was thereby committed. It is maintained by plaintiff's counsel, however, that, if the court's expression was objectionable, any error in that respect was cured by the following part of the charge:

"If the jury believe that W. B. Keen made advances toward the defendant, and the defendant simply refused to receive those advances, without rejecting them, and did no affirmative act to encourage the said W. B. Keen, except to passively receive his advances, then your verdict must be for the defendant. I give you this as the law. I said to you yesterday that it was the

duty of a good woman to affirmatively reject such advances, and to send a man about his business when he offered them. On further consideration, I think my statement yesterday was not the law; but this is the law, if she does not do anything to encourage them. The mere fact that a man becomes infatuated with her, and falls in love with her, if she does nothing affirmatively to encourage that affection, does not, in itself, furnish a ground of action—a cause of action. In order to sustain an action for the alienation of the husband's affection, it must appear, in addition to the fact of alienation, or the fact of the husband's infatuation for the defendant, that there had been a direct interference on the defendant's part sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is upon the plaintiff to show such interference."

The only part of this instruction that could be applicable to the court's remark is that which relates to the duty a good woman owes to society—affirmatively to reject the advances of a man when offered, and to send him about his business. A comparison of this language with that used by the court in its observation, to which exception was taken, would seem to indicate that the reference in the instruction was not directed to the remark, which leaves the impression that if Keen, who was then married to another, sought the defendant's society, it was to be inferred from his suit that she encouraged his addresses and was therefore liable for the consequences which followed. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect: B. & C. Comp. § 783. Our statute commands that, in charging the jury, the court shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact: B. & C. Comp. § 139.

The remark complained of was, in our opinion, a violation of the provision last mentioned, and, believing that it was not expressly withdrawn, it is impossible to say what the effect of such language was on the minds of the triers of the fact; and hence the judgment is reversed, and a new trial ordered.

REVERSED.

Argued 18 April, decided 18 June, 1907.

LE BRUN v. LE BRUN.

90 Pac. 584.

GIFT CAUSA MORTIS—EFFECT OF EVIDENCE.

It appears that defendant, when dangerously ill, deeded the property to plaintiff, who thereupon executed back the deed in question, which was delivered to a third person, who delivered it to defendant after his recovery, in view of which it must be held that the deed was a gift *causa mortis* and was clearly revoked by the acceptance of the deed revesting the title.

From Marion: WILLIAM GALLOWAY, Judge.

Suit by Charles Le Brun against Firmin Le Brun to cancel a deed. Plaintiff appeals from a decree dismissing the suit.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George Greenwood Bingham*.

For respondent there was a brief with oral arguments by *Mr. William Marion Kaiser* and *Mr. Tilmon Ford*.

Opinion by MR. CHIEF JUSTICE BEAN.

This is a suit to cancel and annul a deed from plaintiff to defendant for 319.13 acres of land near Gervais, in Marion County. The land in controversy is the donation claim of defendant, upon which he has continuously resided for more than 50 years, except for about 2 years when he lived with the family of the plaintiff. On December 14, 1900, while he was sick and expecting to die, he conveyed the land for the expressed consideration of "\$1,000, love and affection, and other valuable consideration, and for my maintenance and support for and during my natural life," to the plaintiff, and at the same time the plaintiff and his wife executed a deed, reconveying the property to the defendant, which deed was left in the custody of Father Schell, a Catholic priest. The defendant subsequently recovered from his then illness, and obtained from Schell the deed executed by the plaintiff in his favor and filed it for record, whereupon this suit was commenced to cancel and annul such deed, on the ground that it was wrongfully delivered.

The plaintiff's contention is that the deed to him from defendant was intended as an absolute conveyance in payment of an indebtedness of about \$1,000, and the further agreement on his part to support and maintain defendant during the remainder of his natural life, and that the deed from him to the defendant was mere security for the performance of the contract for support and maintenance, and was to be held by Schell for that purpose, and that he has fully performed such contract, notwithstanding which Schell wrongfully delivered the deed to the defendant, who caused it to be placed of record. The defendant, on the other hand, claims that the deeds referred to were parts of the same transaction, and were intended as a testamentary disposition of his property; that at the time they were made he was dangerously ill and did not expect to live but a short time, and, in order to dispose of his property after death, he made a conveyance to the plaintiff, but took a reconveyance from him, which was to be deposited with Schell to be delivered to defendant in case he recovered from his then illness.

The plaintiff is a nephew of defendant, and came to Oregon from Canada at defendant's request more than 25 years ago. For the first two years after his arrival he worked for defendant to pay his "passage money," and a few years later married a niece of defendant's wife. For 10 or 12 years after their marriage the plaintiff and his wife lived with the defendant, farming the land in controversy on shares. They then moved to a place of their own, two or three miles from that of defendant, where they have ever since resided; the plaintiff continuing to cultivate and farm the defendant's land on the shares as before. In December, 1900, the defendant, who was then about 76 years of age, and in poor health, requested Scott Taylor, a notary public, to prepare a will for him, devising his property to the plaintiff, as his wife had died some years previous and he had no children or near relatives. Before the will had been prepared and executed, however, the defendant went to Portland to consult a physician, but, obtaining no relief, returned to Gervais, where he was met by the plaintiff and taken to his (plain-

tiff's) home. On the afternoon of the 14th he was taken suddenly and dangerously ill, and Father Schell, a neighboring Catholic priest, was immediately summoned. He had previously consulted Schell about the disposition of his property, and had advised him of his intention in that regard, and, as soon as Schell learned of his serious illness, he telephoned to Taylor to bring the will which he had prepared and some blank deeds. Schell and Taylor arrived at the plaintiff's house in the evening, and found defendant very sick and apparently near final dissolution.

The matter of the disposition of his property was immediately mentioned by some one of the parties, and Schell testifies:

"He (defendant) told me that in case of his death, which he expected soon, he would like to give all that he had to the plaintiff and his family, and to use my best judgment and do whatever I thought best, as he had full confidence in me. He wanted me to will the land to the plaintiff. I suggested a deed in place of a will. The plaintiff had absolutely nothing to do with it, and was not in the room, and knew nothing about it until I went into the kitchen and informed him in what way I had transferred the property to him. The deed was adopted in place of a will to save court expenses and to remove all chances of a possible contest of a will. It was my idea to put in a \$1,000 cash consideration. It was wholly fictitious, and done to give the deed a better appearance. Chas. Le Brun was to give a deed back in case the defendant should not die. This latter deed was to be kept by me, and in case the defendant should get well, I was to deliver it to him to be kept or to be put on record, according to his wishes. It was left with me because he was sick and unable to take care of it, and I was to deliver it to him if he recovered from his then sickness, as it was his property. No one was present at the time the deeds were made, except Taylor, the defendant and myself. There was no agreement between the plaintiff and defendant about the deed. The understanding was that, if the defendant did not survive his then sickness, I was to destroy the deed, but, if he did, I was to give it to him. The transfer by defendant to the plaintiff was a pure gift, and the matter of support and maintenance was not mentioned at the time, nor did any previous indebtedness operate as a consideration. The defendant recovered from his illness in three or four months, and asked for the deed, and I delivered it to him."

Taylor, who prepared the deeds and was present at the time

of their execution, testifies that the defendant was very sick when he and Schell visited him:

"I had told him I had made the will as directed and it was ready for signing. He said: 'You can talk to Father Schell about the matter. I think I will deed the land to the plaintiff. I want him to have it anyway.' When I started in to draw the deed, I asked for the amount of consideration, and plaintiff, Schell and the defendant had some conversation about the matter. I did not hear what they said, except occasionally some references to wages and hauling lumber, and that plaintiff said: 'You fix it to suit yourself. You make it to suit yourself. It is all right.' One thousand dollars was finally agreed upon as a consideration, and I put it into the deed, and also a stipulation for support and maintenance. Defendant said: 'Put in maintenance and support. Charley has got to keep me as long as I live. That is the understanding. I do not think I will live very long, because I am pretty sick.' I made out two deeds to the plaintiff at the time, one for the farm and the other for the Woodburn property. I had no stamps with me, and the next day the plaintiff brought the deed for the farm, and I stamped it, and he took it to be recorded. I also prepared at the same time two bills of sale from the defendant, one to the plaintiff's daughter and the other to the plaintiff. Schell gave me the description of the personal property. After the two deeds and bills of sale had been prepared, Schell asked me to make out a deed from the plaintiff and his wife to defendant, and said he wanted it to hold over plaintiff for a whip if he did not maintain and support defendant as agreed upon. When the deed was made out, Schell called the plaintiff and his wife into the room, and I explained to them the purpose as best I could in French, as they did not speak good English, and said to them that Schell was to hold the deed and see that defendant is treated right if he lives, and, if he dies, to give it to you. They hesitated about signing it, but finally did so. The deed was not stamped, because Schell said it was not to be put on record. I don't think the defendant said a word while the matter of the deed was being talked over, as he was pretty sick and expected to die at any time. After the deed from the plaintiff to the defendant was executed I handed it to Father Schell."

The plaintiff, so far as he was able to testify as to what occurred at the time the several deeds were executed, corroborates the testimony of Schell, but neither the defendant, the plaintiff

nor his wife can give a very intelligent account of the transaction—the defendant, because of his illness, and the plaintiff and his wife, because they were not in the room when the matter was arranged, and know but little about it, except what others told them.

John La Chapelle, one of the witnesses to the deeds, testifies that he was asked to come into the defendant's room and witness the deeds, that, according to his understanding of what was said at the time, the deed from the plaintiff to defendant was to be left with Schell, and, if defendant got well, it was to be delivered to him, and if not it was to be returned to plaintiff.

Louis Forcier, a son-in-law of the plaintiff, who was in the house at the time, but not in the room when the deeds were executed, testified that the plaintiff came into the kitchen with the deed from defendant in his hand and gave it to his wife, saying that the defendant had given him the property if he died, but, if he got well, he was to have it back, and that the deed from the plaintiff and his wife to the defendant had been left with Schell, and, if defendant died, Schell was to destroy it, and, if not, to deliver it to the defendant.

No change was made in the possession or cultivation of the property in controversy after the deeds referred to had been executed, and the plaintiff continued to farm it as before, delivering to the defendant each year his share of the proceeds. Whatever conflict there may be in the testimony, or whatever inference may be drawn from it, one important, and to our mind, controlling fact stands out prominently, and is uncontradicted. The defendant at the time the deeds in question were executed was providing for the disposition of his property after death. He was dangerously ill, and neither he nor any of the parties interested expected him to recover. His spiritual advisor and a notary public had been hastily summoned to administer to his spiritual comfort and to arrange for the disposition of his property. The method of effecting the purpose was discussed, and the plan adopted finally agreed upon as the most convenient and satisfactory and least expensive. There was no intention

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on the part of the defendant to make a gift of his property to the plaintiff *inter vivos*, nor to provide for his own future support and maintenance. He though he was about to die, and naturally would not be considering a question of his own future support, and no one pretends that there was any conversation between him and the plaintiff concerning that matter, or that it was ever discussed by them. The clause in the deed to that effect was inserted by the notary principally, if not entirely, upon his own motion, and it is contrary to all the circumstances of the case and the manifest intention of the defendant to assert that the deed was made by him to plaintiff in consideration of an agreement for future support and maintenance, or that the reconveyance from the plaintiff to him was intended to secure the performance of such an agreement. The parties were not dealing with or considering matters of that kind, and the only reasonable and consistent theory of the entire transaction is that detailed by Father Schell. The defendant thought he was going to die very soon, in which event he desired his property to go to plaintiff, his nephew. To carry out this purpose was the object of the parties. In place of making a will he chose acting upon the advice of Schell—to deed the property to plaintiff—but to protect himself in case of a recovery, an event not then anticipated by any one, and in case of such recovery, he required a reconveyance from the plaintiff to be delivered to him. This is manifestly the most reasonable and consistent interpretation of his conduct, and is in harmony with the great weight of testimony. The claim that the deed to the plaintiff was made in payment of an antecedent debt for labor performed more than 25 years prior to its execution is not supported by any testimony, and is negated by the plaintiff himself, who says that such labor was performed in payment of his "passage money" from Canada. The conveyance from the defendant to the plaintiff was in the nature of a gift *causa mortis*, and was probably revoked by his subsequent recovery: 3 Pomeroy, 1150; *Curtiss v. Barus*, 38 Hun, 165; *Basket v. Hassell*, 107 U. S. 602 (2 Sup. Ct. 415: 27 L. Ed. 500). But, whether it was or not, the deed

to him from the plaintiff was intended to revest the title in him in case of a recovery, and should be given that effect.

Decree affirmed.

AFFIRMED.

Mr. Commissioner SLATER, having been of counsel, took no part in the decision.

Argued 10 April, decided 28 May, rehearing denied 16 July, 1907.

MARSTERS v. UMPQUA OIL CO.

90 Pac. 151.

CORPORATIONS—RIGHT TO QUESTION LEGALITY OF.

1. The legality of the organization and existence of a *de facto* corporation that has exercised corporate powers can be questioned only by the state, and cannot be questioned collaterally in a suit between private parties.

CORPORATIONS—LIMIT OF RIGHT OF CREDITOR TO QUESTION PROCEEDINGS BY DIRECTORS FOR THEIR OWN BENEFIT.

2. The rule of law which disqualifies a director from binding a corporation by a transaction in which he has an adverse interest is for the protection of the corporation and its stockholders, as are the provisions of law and the by-laws of the company relative to meetings of directors, quorums, etc., and they cannot be invoked by any one else, since such transactions are merely voidable, and not void. An attack by a creditor on proceedings by which the directors have profited must always be on the ground of fraud, and that only.

SAME—CASE UNDER CONSIDERATION.

3. In a suit to foreclose two mortgages against a corporation, a creditor who acquired a judgment lien on the mortgaged property subsequent to the recording of the mortgages was made a defendant. Plaintiff, as one of the directors of defendant corporation, had acted to make a quorum in authorizing the execution of the notes and mortgages which were duly executed by the president and secretary. One of the loans had been made from plaintiff, and the other from a bank which afterward assigned its interest to plaintiff. The defendant corporation made no repudiation of the transaction and did not answer, but the judgment creditor, in addition to a general denial, alleged that the defendant corporation was not duly organized, that the alleged president and secretary had no authority to bind it by the notes and mortgages, and that their acts were not authorized; but there was no averment or evidence that the obligations were not made in good faith to secure money actually loaned to the corporation and used by it in the prosecution of its enterprise. Held, that the validity of the obligations could not be questioned by the judgment creditor.

EVIDENCE—PRESUMPTIONS OF CONTINUANCE OF OWNERSHIP.

4. In a suit to foreclose a note and mortgage, where the mortgagor testified that the mortgage to plaintiff had never been paid or discharged, the presumption is that plaintiff continued to be the owner thereof.

PRINCIPAL AND SURETY—RIGHTS OF SURETY AS TO PRINCIPAL—RIGHT
AFTER PAYMENT—REIMBURSEMENT AND SUBROGATION.

5. Where the plaintiff had been a surety on a note, but subsequently bought it, the assignment to him was not a discharge of the note, but entitled him to be subrogated to the rights of the creditor against his principal, and to foreclose a mortgage given to secure the note.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by A. C. Marsters to foreclose two chattel mortgages alleged to have been executed by the Umpqua Valley Oil Co., which was organized as a corporation in 1901 in South Dakota, by filing articles of incorporation in the proper office, with a capital stock of \$400,000, divided into 400,000 shares, of the par value of \$1 each, for the purpose of owning and developing oil wells and coal mines in the states of Oregon and California. The articles, as filed, state that the corporation is formed by M. McCoy, H. L. Marsters, T. R. Sheridan and the plaintiff, residing at Roseburg, in this state, and S. H. Elrod and J. F. Way, residing at Clark, S. D., and that they shall constitute the first board of directors, and serve until their successors are elected and qualified, and that McCoy shall act as president, Elrod as vice-president, H. L. Marsters as secretary, and Sheridan as treasurer. No stock books seem to have been opened or stock regularly subscribed, but it is stated, after the signature of the incorporators to the articles of incorporation, that McCoy, Sheridan and the two Marsters each owned 100 shares, and Elrod and Way 10 shares each. On April 13, 1901, what purported to be a stockholders' meeting was held at Roseburg, in this state, at which there were present, either in person or by attorney in fact, all the persons named as incorporators, except Sheridan. The record of the meeting shows that McCoy, H. L. Marsters and the plaintiff each represented 100 shares of stock, and Elrod and Way 10 shares each, and that the several persons named as incorporators were elected directors, and by-laws were adopted defining the duties of the respective officers, and providing that three directors shall constitute a quorum. On the same day three of the directors so chosen convened and elected McCoy presi-

dent, Elrod vice-president, H. L. Marsters secretary, and T. R. Sheridan treasurer. The persons thus designated have ever since continued to act as directors and officers of the corporation, managing its business, disposing of its stock, making contracts on its behalf, and in general representing it in all its corporate transactions.

On September 27, 1902, McCoy, H. L. Marsters and plaintiff met as directors, pursuant to call of the president, and, among other things, adopted a resolution directing the president and secretary to borrow \$500 for the company, and authorizing and empowering them to execute a promissory note therefor, secured by mortgage on its machinery and tools. In pursuance of this resolution, the president and secretary, on September 29, 1902, borrowed from plaintiff \$500, executing the company's note secured by mortgage. On April 25, 1904, the president and secretary executed another promissory note of the company, with plaintiff as surety, to the Douglas County Bank, for \$500, and a resolution was adopted at a meeting of the directors called by the president, McCoy, H. L. Marsters and the plaintiff being present, authorizing them to borrow \$500, and to secure the same by chattel mortgage on the company's property. On July 16, 1904, a mortgage was accordingly given by the president and secretary to the bank to secure the payment of its note. This note and mortgage was thereafter assigned to the plaintiff, and this suit is brought by him to foreclose the two mortgages above referred to. John Marsh, who recovered a judgment against the defendant corporation in October, 1904, in an action brought by him on August 8 of that year to recover \$240, for labor and services performed for the corporation between the 8th day of April and the 12th day of July, and who obtained an order for the sale of the mortgaged property which had been attached in such action, was made defendant. The corporation made default, but Marsh answered, denying the material allegations of the complaint, and for affirmative defenses pleading: (1) That the defendant corporation was not legally organized; (2) that the persons assuming to act as president and secretary had no

authority to bind it by the execution of the notes and mortgages in suit, and that their acts were not legally authorized. The plaintiff had a decree in the court below, and Marsh appeals.

AFFIRMED.

For appellant there was a brief over the name of *Fullerton & Orcutt*, with an oral argument by *Mr. James Corwin Fullerton*.

For respondent there was a brief over the names of *F. W. Benson* and *Crawford & Watson*, with an oral argument by *Mr. James Owen Watson*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The evidence shows, and it is undisputed, that the defendant corporation, at the time of the execution of the several notes and mortgages in controversy, was, and had been for a long time prior thereto, acting as a corporation in pursuance of articles regularly filed. It had a board of directors and other corporate officers, and was exercising the functions of a corporation. The legality of its organization cannot, therefore, be inquired into in this action. It was at least a *de facto* corporation, and the rightfulness of its existence can be questioned by the state only: 10 Cyc. 256; *Jones v. Hale*, 32 Or. 465 (52 Pac. 311: 8 Am. & Eng. Corp. Cas., N. S., 150, with note on the validity of a mortgage to a director).

2. It is claimed that the mortgages in suit are void because given by the corporation to and for the benefit of one of its directors, and that all the directors did not have notice of the meeting at which they were authorized, and that there was not a quorum present at such meeting, exclusive of the plaintiff, who was interested and could not act. These questions would be important, and deserve careful consideration, if urged by the corporation or a stockholder; but a subsequent lien creditor can attack the mortgages on the ground of fraud only. The rule of law which disqualifies a director from binding the corporation by a transaction in which he has an adverse interest is for the protection of the corporation and its stockholders, and the same is true of the provisions of law and the by-laws of the company

relative to the meeting of directors, quorums, etc. A director is an agent of the corporation. He cannot, therefore, at the same time act for himself and his principal without full knowledge and free assent of the principal, and, if he assumes to do so, his acts may be avoided by the corporation or its stockholders. Such transactions, however, are not absolutely void; they are only voidable at the instance of the corporation or a stockholder. A corporation or its stockholders may, like an individual, elect to confirm a transaction which could have been repudiated on the ground that the agent had an interest in the matter adverse to his principal, or that the meeting authorizing the transaction was not regularly called or held; and, if the transaction is acquiesced in by the corporation and its stockholders, it becomes as valid and binding as if regularly authorized. A creditor does not, in this respect, stand in the position of the corporation or a stockholder, and he is not entitled to exercise the rights of either. The directors or officers of the corporation are not his agents. Nor is the provision relative to the meeting of directors, quorum and the like, for his benefit. His right to question a transaction of this character, which has not been repudiated or disaffirmed by the corporation or a stockholder, depends upon its fraudulent character, and not whether it was regularly authorized in the first instance. If it was in fact fair and honest, and not intended to hinder, delay or defraud creditors, it cannot be attacked by him: 10 Cyc. 1195; 3 Clark & Marshall, Corporations, 2358; 5 Thompson, Corporations, § 6165; *O'Conner Min. & Mfg. Co. v. Coosa Furnace Co.* 95 Ala. 614 (10 South. 290: 36 Am. St. Rep. 251); *Campbell v. Argenta Gold & S. Min. Co.* (C. C.), 51 Fed. 1.

3. Now, in this case, the mortgages in question have not been repudiated or disaffirmed by the corporation or its stockholders. Their validity is admitted by the failure to answer, and there is neither averment in the pleading, nor evidence in the record, showing, or tending to show, that the notes and mortgages were not made in the utmost good faith to secure the payment of money actually loaned to the corporation and used by it in the

prosecution of its enterprise. They cannot, therefore, be questioned by a creditor who has acquired a lien upon the mortgaged property subsequent to their execution and recording.

4. It is also claimed that there is no proof that the note and mortgage executed by the corporation to the plaintiff has not been paid, or that the note and mortgage in favor of the Douglas County Bank has been assigned to him, or that he is now the owner of either of such mortgages. The secretary of the corporation testifies that the mortgage to the plaintiff has never been paid or discharged, and since it was made and delivered to him the presumption is that he continues to be the owner thereof. The president of the Douglas County Bank testified that the bank assigned and transferred the note and mortgage held by it to the plaintiff for and in consideration of the payment to it of the sum of \$500.

5. A contention is also made that, because the plaintiff was surety on the note to the bank, the assignment of such note to him was, in effect, a payment and discharge thereof. The note on its face disclosed, and the evidence shows, that he was but a surety, and was therefore entitled, upon payment of the debt, to be subrogated to all the rights of the creditor as against his principal, and entitled to foreclose the mortgage given to secure the payment of such note.

Decree of the court below is affirmed.

AFFIRMED.

Argued 2 March, decided 30 April, rehearing denied 23 July, 1907.

HOFFMAN v. HABIGHORST.

89 Pac. 952, 91 Pac. 20.

PRINCIPAL AND SURETY—EFFECT OF NOTICE TO AGENT OF SURETYSHIP.

1. Notice of the facts constituting suretyship reaching one who is an agent of the principal as to this transaction is notice to the principal.

SAME—CASE UNDER CONSIDERATION.

2. Where several parties sign a note as makers, but under an understanding with the officers of a company in which they are all interested, that the note is really to be used as collateral to secure a loan to such company, this being known to the agent through whom the money was borrowed and paid to the company, such parties are sureties as to the principal who loaned the money, she being bound by the knowledge of

her agent, though the note was really made directly to her and the real beneficiary never executed any instrument to which the note in question could be collateral.

CONTRACTS—CREATION OF RELATION OF CREDITOR AND DEBTOR.

3. To create the relation of creditor and principal debtor it is not necessary that the promise to pay shall be made directly to the creditor by the debtor, but it will suffice if the promise is made to the surety by the debtor, for a valuable and executed consideration, and thereafter the creditor, with knowledge of that fact, deals directly with the real debtor in relation to the debt, ignoring the surety.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY BY EXTENDING TIME FOR PAYMENT OF NOTE.*

4. Where a payee of a note grants an extension of time for payment thereof to a principal debtor, without the consent of its sureties, the sureties are discharged from liability, not only to the payee, but to those who take by assignment from him after maturity.

PRINCIPAL AND SURETY—DISCHARGE BY ACT OF CREDITOR—KNOWLEDGE OF SURETYSHIP.

5. To render conduct of a creditor available as a discharge of the sureties of a debtor, it must appear that when the acts relied upon occurred the creditor knew of the suretyship. It is not necessary that the creditor had this knowledge when the debt was incurred, it will be sufficient if he had acquired it before the occurrence complained of.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. COMMISSIONER SLATER.

This is an action by Julia E. Hoffman, as executrix, on a promissory note made by E. H. Habighorst and 14 others, of date February 29, 1892, for the principal sum of \$15,000, payable one year after date, with interest at 8 per cent per annum, to the order of Mrs. Sarah Wertheimer, who, on or about August 29, 1895, sold and transferred it to the plaintiff. It is claimed by the defendants that the note in suit was given without any valuable consideration coming to them, but was made at the request of the Portland Guarantee Company, a corporation, to be used by it as collateral security in borrowing that amount of money from Mrs. Wertheimer, and that she, with knowledge of that relationship and without their consent, by a valid agreement, extended the time of payment to the Guarantee Company, and thereby released them; that at the same time, as a considera-

*NOTE.—The acts on which this decision is based occurred before the Negotiable Instruments Act of 1899 was enacted, while the decision in *Cellers v. Meachem*, ante, p. 186, deals with occurrences since that act was passed.

tion for the contract extending the time, she received from said company security for the payment of said debt, which she afterwards surrendered and released without defendants' consent; and that thereby they were also released. This is the second appeal of this case. On the first appeal a judgment in plaintiff's favor was reversed for error in sustaining a demurrer to the answer. The case is reported in 38 Or. 261 (63 Pac. 610: 53 L. R. A. 908), to which reference may be made for the allegations of the complaint and answer. After the cause was remanded the plaintiff replied, denying all of the allegations of the answer. A trial was had, and at the close of the taking of testimony all of the defendants moved the court for a directed verdict in their favor, which being denied, all of them, excepting Habighorst, made a similar motion, which was also denied. Thereupon plaintiff moved for a directed verdict in her favor for the amount of the note, and the same was allowed and judgment thereon was afterwards awarded, from which the defendants again appeal, assigning as error the overruling of their motions for a directed verdict as well as the allowance of plaintiff's motion. Numerous other assignments of error on rejection and admission of testimony are made. REVERSED.

For appellants there was a brief over the names of *William David Fenton* and *E. S. J. McAllister*, with an oral argument by *Mr. Fenton*.

For respondent there was a brief over the names of *Guy G. Willis* and *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Rufus Mallory*.

Opinion by MR. COMMISSIONER SLATER.

Upon the first appeal of this case it was determined that the facts stated in each of the three separate defenses constituted a good defense to the action, which, with the necessary legal inferences therefrom, under the principle of *stare decisis*, are now binding on this court. It was there held that it may be shown by parol that a promissory note was in fact made to secure the debt and liability of another, and thus all the makers be entitled

to the rights of a surety as to the payee of such note having knowledge of the facts. If such a note is enforced against the makers, they would clearly be entitled to be indemnified by the principal debtor; and this is given as one of the tests of suretyship. The form of the obligation would not prevent the introduction of such evidence.

The principal question now to be determined is whether there was any competent testimony offered tending to support any of the alleged defenses, so that it was incumbent upon the court at least to submit the cause to the jury, and also whether, from the admitted facts and uncontradicted testimony material to the issues, the court was bound to direct a verdict for the defendants or for a part of them. The following facts were either admitted or proven by competent testimony:

The Portland University was incorporated in 1891 under the laws of Oregon for the purpose of establishing and maintaining an institution of learning, which, for brevity, will be hereafter referred to as the "University." This corporation was without funds and credit. To provide it with both, another corporation was formed and known as the Portland Guarantee Company, which, for the same reason, will be referred to as the "Company." The purpose and object of its formation was to aid the University and to act as its financial agent. The plan adopted for getting money for the University was to issue bonds and have their payment guaranteed by the Company. Bonds to the amount of \$250,000 were issued and guaranteed. With these bonds a large amount of land in the suburbs of Portland was purchased by and conveyed to the University, which was also conveyed by it to the Company. This land was laid out into lots and blocks and platted as "University Park." The object and purpose of this transaction was to have the Company act as the financial agent of the University with full power to dispose of and convey the lands to purchasers, and from such sales, not only pay off the bonds as they fell due, but acquire funds necessary to commence the construction of necessary college buildings and maintain the school. Many lots were sold, a building was erected,

and a school started. It is not claimed by either party to this action, as we understand counsel, that the Company had any other object or business than thus to serve the University.

In February, 1892, the University was in need of money, and the Company undertook to procure it. With this object in view, it applied to Ben Selling, who was the financial agent of Mrs. Sarah Wertheimer, for a loan of \$15,000. Selling had that amount of his principal's money in hand which he desired to loan, but refused to lend it to the Company, giving as a reason that he did not consider it financially responsible. At this time Dr. C. C. Stratton was president of the board of directors of the University and was a director in the Company. P. L. Willis was secretary of both corporations. Messrs. Akin, Meyers, Willis, Crawford and one other were directors of the Company. Akin was also a partner in business with Selling, who was also a stockholder in the University and was conversant with its needs and plans as well as the object and purpose of the Company. Stratton, Willis and Akin discussed among themselves and with Selling the ways and means of securing the needed money, and concluded that individuals interested in the success of the University might be induced to sign a note to assist the Company in procuring the money, and in formulating this plan each of these parties had talked with Selling. With this object in view, Stratton went to each of these defendants and stated in substance that he was acting for the Company; that it needed \$15,000 to supply the wants of the University, and could obtain it if he could procure the signatures of 15 good responsible people to the note which he exhibited to each of them; that the Company was amply responsible to the amount of the note, and would pay the note out of the proceeds of the property conveyed to it by the University, which it was then selling by lots; and that, in case there should be a failure thus to pay the note, the Company would set aside about 88 lots out of which sales would be made to pay the note. The Company was to sell the lots, but how the said 88 lots were to be set aside for security was not agreed upon when Stratton procured the signatures of the defendants and

their co-makers to the note. There was no statement made to them by Stratton, and none of them understood, that they were lending that amount of money to the Company, nor did they understand that the Company was to execute its note in their favor for a like amount and upon the same terms as the note signed by them. The note in question was doubtless made in the office of Selling, where all the business was transacted as between him, Stratton, Willis and Akin, and was then given to Stratton to get the signatures. Each of the defendants signed the note upon the above understanding, and upon the further understanding that none of them was to look after its payment, which was to be done by the Company.

Stratton, after obtaining the signatures, delivered the note to Willis, as secretary of the Company, which, on February 29, 1892, the date of the note, ordered a note of like amount and upon the same terms executed in its name and in favor of the defendants and their co-makers, and to secure the payment of the same it also ordered that a deed of general warranty be executed in its name, conveying to E. H. Habighorst certain lots in University Park, both of said instruments to be left in escrow with P. L. Willis, to be by him delivered to said Habighorst upon the latter's request, for the protection and benefit of the makers of the note. In pursuance of such order, a note and deed of the character described were executed, but were never delivered to Habighorst. Nor did any of the defendants know of the execution of the note until after this action was brought. Nor did any of them, except Habighorst, know of the execution of the deed; and he learned of its existence only after the making of the contract extending the time of payment of the note in suit. Willis, after receiving from Stratton the note in suit, took it to Selling and received from him the money. Selling never had any dealings with any of the defendants or their co-makers in the matter of making said loan.

The interest, which fell due quarterly, was paid by the Company to Selling at the latter's office, Willis always attending to that matter. The records of the Company show that a warrant

was ordered drawn on its treasury to pay each quarter's interest as it fell due on the note of the Company to Habighorst and others, and Willis swears he paid the money direct to Selling for the defendants and their co-makers on the Wertheimer note at the request of Habighorst. The latter, however, denies that he ever so requested, but there is no competent evidence in the record that Habighorst had any authority from his co-makers to act for them in this or in any other matter connected with this transaction. When the note came due, no demand for payment was made by Selling or any of the makers, nor did any of them, except Habighorst, know before this action was begun that it had not in fact been paid by the Company. In August, 1893, the Company, learning from Selling that he was becoming uneasy on account of the nonpayment of the note, and because of the financial crisis then impending, and knowing that, if Mrs. Wertheimer sued the defendants and their co-makers, they, in turn, would be forced to sue the Company, which would precipitate a general crisis in its affairs and prove disastrous to its whole financial scheme, thereupon negotiated with Selling for an extension of time for the payment of the note in action, which resulted in the execution of the written contract between them, which is set out in full in the answer and may be found in 38 Or. 261, 263 (63 Pac. 610: 53 L. R. A. 908). All this was done without the consent of any of the defendants or their co-makers, and without the knowledge of any of them, except Habighorst who knew of the contemplated agreement but protested against it. The terms of the agreement were carried out by each of the parties to it and became fully executed. On August 29, 1895, the note was assigned and transferred to plaintiff by Mrs. Wertheimer as alleged; but on September 24, 1895, without the knowledge or consent of any of the defendants, Selling surrendered up to Willis at the latter's request the deed of the Company to Mrs. Wertheimer mentioned in said contract, and conveying all of blocks 49, 51, 53 and 67, in University Park Addition, which deed had been intended by the parties to operate as a mortgage, and had never been recorded. Before

this action was commenced all the property held by the Company was seized and taken by legal proceedings instituted by its other creditors.

From these facts plaintiff contends that the essence of the transaction is a loan by Mrs. Wertheimer to defendants and their co-makers, who thereupon loaned the money to the Company and received its note payable one year after date with security; that the relation of principal and surety between the Company and defendants did not exist, especially as to Mrs. Wertheimer, who had declined to loan to the Company, because there was no privity of contract between her and the Company; and that the extension agreement plead as a defense was not made by her with the principal debtor, but with a stranger to the original transaction, and that its execution could have no effect on the rights of these defendants. The defendants, however, contend that the Company borrowed the money from Mrs. Wertheimer, and that their note was given to be used by the Company as collateral security for such loan with the knowledge of such fact in Mrs. Wertheimer, and that thereby they were sureties only.

1. It is not necessary to do more at this time than to state the rule heretofore announced by this court, that whenever an agent acting in the scope of his authority receives notice or has knowledge of a state of facts in a matter in which he represents the principal, and which he is in duty bound to communicate to his principal, it binds the principal: *Wood v. Rayburn*, 18 Or. 3 (22 Pac. 521); *Rayburn v. Davisson*, 22 Or. 242 (29 Pac. 738); *Farmers' Bank v. Saling*, 33 Or. 394 (54 Pac. 190).

2. Within this rule, whatever knowledge or notice Selling may have had as to any contractual relations existing between the Company and the defendants which would affect their contractual relation to his principal, at the time the loan was made or at the time the contract for the extension was made, and which may have affected her rights against said parties, is notice to Mrs. Wertheimer, and she will be bound thereby. As between

the Company and the makers of the note in suit, regardless of who was the original debtor or borrower, the uncontradicted evidence clearly establishes the relationship to one another of principal on the part of the Company, on the one hand, and surety on the part of the defendants and their co-makers, on the other hand, in respect to the debt owing to Mrs. Wertheimer evidenced by this note. The makers of the note received no part of the money borrowed from Mrs. Wertheimer on the credit of the note but it all went to the Company to be used for the University, and of this fact Selling well knew. They received no consideration whatever for signing the note, except the promise of Dr. Stratton, as agent for the Company, that it would pay the note out of the proceeds from the sales of lots; that is, they signed the note and thereby bound themselves to the payee in consideration of the promise of the Company that it would as to them be principal debtor and discharge the debt at its maturity without the payee having to resort to them. They were entitled then in law, whenever the obligation was enforced against them, to be indemnified by the Company, who ought to have made payment before the makers were compelled to do so. The consideration received by the Company for its promise to them is the \$15,000 received on the credit of the note and thus far the contract is an executed one. To this state of facts the case of *Smith v. Sheldon*, 35 Mich. 42 (24 Am. Rep. 529), is peculiarly applicable. Mr. Chief Justice COOLEY in rendering the opinion says: "Now, a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds are taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him,

his rights are in no manner affected by it; but, if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt he shall not lose sight of the surety's equities."

But we are to inquire what knowledge, if any, Mrs. Wertheimer is chargeable with respecting such relationship of principal and surety as to this debt. Besides Selling's knowledge of the purpose and object of the loan and who derived the sole benefit thereof, and the peculiar manner in which the defendants' signatures were obtained, all of which we think would be quite sufficient for that purpose, we need go no further than the recitals of the contract for extension of payment to conclusively settle that matter. It is there admitted over Mrs. Wertheimer's signature, affixed thereto by her agent, Selling, that the loan was for the benefit of the Company, and that it received the money, and its duty to pay the loan in the first instance is at least impliedly admitted. It is therein recited that "said Company desires a further extension of time," and it is therein expressly agreed that "said Wertheimer shall and will extend the time of payment of said loan so that it may be paid by said Company on or before the 29th day of August, 1894." This language necessarily presupposes knowledge of the existence of some prior legal obligation resting on the Company to pay said loan arising either out of a direct promise to that effect made to Selling or out of a collateral promise made to the makers of said note.

3. Counsel for plaintiff, however, argue with much force that to operate as a release of sureties the contract for extension of time must be made between the creditor and the principal debtor; that here there is no evidence of a direct promise made to Mrs. Wertheimer by the Company, the alleged principal debtor, either at the inception of the loan or in the extension agreement, to repay the loan, and hence there is no privity of contract between them; and hence that, as to her, the Company never was her principal debtor. But to create such relationship between the parties the law does not require a direct promise

to the creditor. It is sufficient that, if based on a valuable and executed consideration, such promise is made to the surety for the direct benefit of the creditor, and if with knowledge thereof the creditor thereafter deals with the promisor in relation to the debt. We have already determined the uncontroverted facts to be that in consideration of the defendants signing the note and the Company receiving the \$15,000 obtained thereon, which it did receive, it promised the makers to become paymaster to the payee of this note. In the case of *Washburn v. Interstate Invest. Co.* 26 Or. 436 (38 Pac. 620), this court says: "Where one person receives a fund or property from another, and, instead of paying him therefor, is allowed to retain the consideration under an agreement to pay it to the creditors of the other party, or when it is agreed between the parties to the contract, there being a valuable consideration therefor, that the promisor may discharge his debt or liability to the promisee by paying it to some third person, to whom the promisee owes some legal duty or obligation, it would be just and proper that such third party should have the right to maintain an action on the contract in his own name. But this is on the theory that the contract, being for his direct benefit, the law invests him with a privity in respect thereto by reason of his interest, and the promisor, in performing the contract, is doing nothing more than to discharge his own debt or obligation in accordance with his agreement. In such case the amount which the promisor agrees to pay is his own debt or obligation, which, by an arrangement with the promisee, he is to pay or discharge in a particular manner; and the parties having by their contract thus treated the third party as primarily interested in its performance." So then the right in Mrs. Wertheimer to sue the Company upon this debt, in the absence of a direct promise to her, may arise from the collateral agreement between the latter and the makers of the note, and she, through her agent, having knowledge of that agreement and having thereafter treated with the Company as principal, thereby adopted the collateral agreement and made it her own. In other words, she has sought to obtain the ben-

efit thereof, and cannot now escape the results legally flowing therefrom.

The case of *M'Questen v. Noyes*, 6 N. H. 19, cited and quoted from with approval by Mr. Chief Justice BEAN in *Hoffman v. Habighorst*, 38 Or. 261 (63 Pac. 610: 53 L. R. A. 908), at page 269 of the opinion, is very much to the point here, and in *Commercial Bank v. Wood*, 56 Mo. App. 214, which is a case very similar, at least in principle, to the case at bar, the plaintiff made the same contention that is now made here. Mr. Justice ELLISON says: "Plaintiff seeks to avoid the force of the contract of extension of time by the assertion that the extension of time must be on a contract with the principal debtor, and that Patton, and not Schneider Meyer, is the principal debtor in this case. But we have already seen that in this state it is settled that Schneider Meyer by his assumpsit became a principal debtor to the holder of the note." In *Union Life Ins. Co. v. Hanford*, 143 U. S. 187 (12 Sup. Ct. 437: 36 L. Ed. 118), Mr. Justice GRAY applied the same doctrine. There a mortgage upon realty was made to secure a loan. Subsequently the mortgagor sold and conveyed the premises by warranty deed to a third party, excepting, however, from the warrantee the said mortgage. The deed recited that the grantee expressly agreed to assume and pay the mortgage debt. This contract was brought to the knowledge of the mortgagee, who, for a valuable consideration, paid by the grantee, extended the time of payment of the mortgage debt without the consent of the mortgagor. Afterwards, on foreclosure, the mortgagee asked for a personal judgment against the original mortgagor for a deficiency after sale of the mortgaged premises. At page 190 of 143 U. S. (page 438 of 12 Sup. Ct.: 36 L. Ed. 118), Mr. Justice GRAY says that "by the law of Illinois, where the present action was brought, as by the law of New York and of some other states, the mortgagee may sue at law a grantee, who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt." And this is upon the principle of law announced by this court in *Washburn v. Interstate Invest. Co.* 26 Or. 436 (38 Pac.

620). Mr. Justice GRAY continues: "According to that view, the grantee, as soon as the mortgagee knows of the agreement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter, and the relation of the grantee and the grantor towards the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt. Where such is held to be the relation of the parties, the consequence must follow that any subsequent agreement of the mortgagee with the grantee, without the assent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability on that debt." To the same effect are *Calvo v. Davies*, 73 N. Y. 211 (29 Am. Rep. 130), cited by Mr. Justice GRAY; *Pratt v. Conoway*, 148 Mo. 291 (49 S. W. 1028; 71 Am. St. Rep. 602); *Hall v. Johnston*, 6 Tex. Civ. App. 110 (24 S. W. 861); *Merchants' Ins. Co. v. Story*, 13 Tex. Civ. App. 124 (35 S. W. 68); *Darke v. Board of Com'rs*, 15 Utah, 467 (49 Pac. 257).

The settled law of this state is the same as that of Illinois and New York—that one who accepts a conveyance of lands in which it is provided that the grantee shall assume the payment of a lien on such lands makes the debt his own, as though he had originally executed it: *Haas v. Dudley*, 30 Or. 355 (48 Pac. 168); *Farmers' Nat. Bank v. Gates*, 33 Or. 388 (54 Pac. 205; 72 Am. St. Rep. 724); *Windle v. Hughes*, 40 Or. 1 (65 Pac. 1058). In *Haas v. Dudley*, 30 Or. 355 (48 Pac. 168), Mr. Justice WOLVERTON says: "The defendants, however, became the principal debtors, as between them and the plaintiff, when they assumed the payment of the \$5,712 upon the mortgage, and the plaintiff remained simply as surety for them." And in *Farmers' Nat. Bank v. Gates*, 33 Or. 388 (72 Am. St. Rep. 724; 54 Pac. 205), Mr. Justice BEAN says: "By the terms of the conveyance from Gates he assumed and agreed to pay it as a part of the purchase price, and thus made it his own as effectually as if he had executed it himself." And hence the cases of *Union Life Ins. Co. v. Hanford*, 143 U. S. 187 (12 Sup. Ct. 437; 36 L. Ed.

118), and *Calvo v. Davies*, 73 N. Y. 211 (29 Am. Rep. 130), are applicable here. The provision of the extension agreement for payment by the Company of an increased rate of interest on the debt is of itself a sufficient consideration to support the contract (1 Brandt, Suretyship, 3 ed., § 389; *Darke v. Board of Comrs*, 15 Utah, 467: 49 Pac. 257), besides which there is the agreement to give and the giving of "further security" by mortgage of four blocks of land.

4. The contract, being based upon a valuable consideration, was binding between the parties, and payment could not have been enforced within the time granted by the contract for payment. It may be true, as counsel for plaintiff has argued, that the makers of the note could have paid at any period of the extended time, and Mrs. Wertheimer would have been obliged to have accepted such payment; but, if so, it would be a voluntary, and not an enforced payment on their part. And for that reason they would have no right of action for indemnity against the Company until the expiration of the extended period: *Ross v. Menefee*, 125 Ind. 432 (25 N. E. 545). In *Commercial Bank v. Wood*, 56 Mo. App. 214, Mr. Justice ELLISON says: "It was a right possessed by defendant to pay off this note at any time after it became due and thereby to become entitled to the mortgage with the right to immediately foreclose on the property described therein. She had the further right to sue Schneider Meyer on his assumption of the debt. Now, suppose she had chosen to exercise either of these rights. She would have found herself delayed, hampered and embarrassed by the contract of extension which plaintiff had made with Schneider Meyer. Defendant, by being subrogated to plaintiff's rights in the mortgage, would stand in plaintiff's shoes, and therefore have to take it incumbered by the contract of extension"—citing *Calvo v. Davies*, 73 N. Y. 211 (29 Am. Rep. 130). The agreement being valid, it is quite clear that it operated as a discharge of the defendant, for it is well settled that, where time is given to the principal debtor without the assent of the surety by a valid agreement which ties up the hands of the creditor, the surety is

discharged: *Walker v. Goldsmith*, 7 Or. 161; *Findley v. Hill*, 8 Or. 247 (34 Am. Rep. 578). And, being released as to Mrs. Wertheimer, they are also released as to the plaintiff who took by assignment after maturity, and therefore subject to all defenses that might be made against the payee. For these reasons the court erred in denying the defendants' motion for a directed verdict in their favor.

It will not be necessary to consider any other of the assigned errors, as this doubtless disposes of the case. The judgment should be reversed, and the cause remanded for such further proceedings as may be proper and not inconsistent with this opinion.

REVERSED.

Decided 23 July, 1907.

ON MOTION FOR REHEARING.

Opinion by MR. COMMISSIONER SLATER.

A very earnest motion for a rehearing has been filed by plaintiff's counsel in this case, in which connection all the issues involved have been reargued; but, after a painstaking and careful re-examination of the whole case, we are constrained to recommend an adherence to the opinion.

5. Plaintiff's main contention is that, in order to sustain the defendants' claim of a release by an extension agreement, it is necessary that the court must first find that the Guarantee Company was the principal obligor and debtor on this note at the time of its execution, for, he argues, if it was not so bound at that time, it would be a stranger to the transaction, and the makers would not be discharged as a result of an extension agreement made by the payee with the Company. In *Manley v. Boycot*, 2 El. & Bl. 46, decided by the Queen's Bench in 1853, it was held that the defense was not available, unless the holder when he took the note knew of the suretyship and agreed to treat the surety as such. But in *Pooley v. Harradine*, 7 El. & Bl. 431, decided in 1857, and in *Greenough v. McClelland*, 2 El. & Bl. 424, decided in 1860 by the same court, it was held that the

defense might be made when the creditor knew of the fact of suretyship, but did not agree to hold the surety as such; and it has been generally held in this country that such sureties may, both at law and in equity, show by parol that they were sureties and were known to be such by the creditor, and they will be entitled to all the rights, privileges and immunities of sureties, and will be discharged by any act of the creditor, after he has knowledge of the fact of suretyship, which discharges any other surety. But it must appear that the creditor at the time the act complained of was done knew of the fact of suretyship. The great weight of authority and of reason is in favor of the law as above stated: 1 Brandt, Suretyship, § 38. The equity of the surety to be discharged when he is prejudiced by the act of the creditor "does not depend upon any contract with the creditor, but upon its being inequitable in him knowingly to prejudice the rights of the surety against the principal": COLERIDGE, J., in *Pooley v. Harradine*, 7 El. & Bl. 431; 1 Brandt, Suretyship (3 ed.), § 38. The relation of principal and surety "is a fact collateral to the contract, and no part of it": VALENTINE, J., in *Rose v. Williams*, 5 Kan. 483.

While the Company may be a stranger to the transaction, so far as disclosed by the paper evidence of it, yet it was not a stranger to the real transaction as disclosed by all the facts giving origin to the paper. It may be conceded, for the purpose of argument, that the defendants, in fact, as well as by the terms of the note, were the real borrowers from Mrs. Wertheimer of \$15,000, and were her principal debtors at the time of the signing of the note, yet back of their contract with her, there is another contract between the defendants and the Company, to the effect that if defendants would sign the note in question, and permit the Company to obtain from Mrs. Wertheimer, for its own use and benefit, the proceeds thereof, it would become paymaster of the note, and upon which the later transaction was based. Mrs. Wertheimer, through her agent, Selling, had notice of this collateral contract at the time of the execution of the note, as well as at the time of the execution of the extension

agreement. Doubtless she was not bound to treat the Company as her debtor, nor to have any dealing with it, in respect to the note. She might do so or not, as it would appear to be to her advantage. But, having knowledge of the contractual relation between the makers of the note and the Company, if she ever dealt with it as her debtor in respect to the debt which was the consideration of the note, she was bound at her peril to observe the rights of the defendants against the Company arising out of their collateral contract. Counsel for plaintiff relies upon 2 Daniel, Neg. Inst. § 1324, who says: "The agreement for indulgence, in order to discharge the drawer or the indorser, must be made with the maker or acceptor, who is the principal debtor; and, if it be made with a third party, it will not affect the drawer's or indorser's rights or remedies, although such third party may have his appropriate remedy for breach of the contract with him." This text is apparently based upon the English case of *Frazier v. Jordan*, 8 El. & Bl. 302, cited in the footnote to said section. There COLERIDGE rules that the doctrine of an agreement for indulgence or extension ought not to be extended in case of a contract with a stranger; that the principal debtor, having given no consideration for the promise, has no ground to complain of the breach. But this principal cannot apply to a case where the alleged stranger has, by previous valid contract with the original principal debtor, and based upon a valuable consideration, viz., the proceeds of the note in question, agreed to assume and pay the debt. These 15 makers were, in fact, the sureties or accommodation makers as to the Guarantee Company, and were entitled to the resulting legal rights and equities arising out of that relationship, and when Mrs. Wertheimer knew, or had notice, of such relationship she was bound to do nothing to endanger or destroy any of such rights, and from that time the Guarantee Company as to her was no longer a stranger in respect to such debt. It was legally bound by contract to the makers of the note to pay it in the first instance, and as between them and itself it was the duty of the Company to either pay it, or in some manner protect the makers from legal process to

collect the note. The Company sought to perform this duty by contracting with Mrs. Wertheimer through Selling, and when doing so was not acting as a volunteer or a stranger to the legal relation existing between Mrs. Wertheimer and defendants.

In *Arnold v. Green*, 116 N. Y. 566 (23 N. E. 1), it is said that the terms "stranger" and "volunteer," as used with reference to the subject of "Subrogation," mean one who in no event resulting from the existing state of affairs can become liable for the debt, and whose property is not charged for the payment thereof, and cannot be sold therefor. The payment by one who is liable to be compelled to make it or lose his property will not be regarded as made by a stranger. When the person paying has an interest to protect, he is not a stranger: *Suppiger v. Garrels*, 20 Ill. App. 625; *Bennett v. Chandler*, 199 Ill. 97 (64 N. E. 1052); *Mavity v. Stover*, 68 Neb. 602 (94 N. W. 834). If, during the period of leniency granted in the extension agreement, defendants had tendered payment of the note, and it was accepted, and then they had sued the Guarantee Company upon its contract of indemnity with them, it, no doubt, could successfully plead in abatement its extension agreement with the payee; but, if defendants had been sued by Mrs. Wertheimer upon this note prior to the expiration of the time given in the extension agreement, they not only could have successfully pleaded the agreement as a defense, but they would have been bound to do so to preserve their right of immediate indemnity as against the Guarantee Company. Not to do so would be in effect confessing judgment upon a demand, the maturity of which had been extended for a valuable consideration paid by one in privity with the defendants.

No distinction whatever has been suggested by counsel for plaintiff, and we think none can be found, between the case at bar and the case of *Union Life Ins. Co. v. Hanford*, 143 U. S. 187 (12 Sup. Ct. 437; 36 L. Ed. 118), cited and quoted in the opinion, and other cases cited there in the same connection, to which may be added the following, to the same effect: *Herd v. Tuohy*, 133 Cal. 55 (65 Pac. 139); *Wyatt v. Dufrene*, 106 Ill.

App. 214; *Stove Works v. Caswell*, 48 Kan. 689 (29 Pac. 1072); *Franklin Sav. Bank v. Cochrane*, 182 Mass. 586 (66 N. E. 200: 61 L. R. A. 760); *Pratt v. Conway*, 148 Mo. 291 (49 S. W. 1028: 71 Am. St. Rep. 602); *Regan v. Williams*, 185 Mo. 620 (84 S. W. 959: 105 Am. St. Rep. 600); *Miller v. Kennedy*, 12 S. D. 478 (81 N. W. 906); *Iowa Loan & T. Co. v. Schnose*, 19 S. Dak. 248 (103 N. W. 22); *Merriam v. Miles*, 54 Neb. 566 (74 N. W. 861: 69 Am. St. Rep. 731); *Travers v. Dorr*, 60 Minn. 173 (62 N. W. 269); *George v. Andrews*, 60 Md. 26 (45 Am. Rep. 706).

For these reasons the motion should be disallowed.

REVERSED: REHEARING DENIED.

Argued 11 April, decided 11 June, 1907.

LATOURETTE v. MELDRUM.

90 Pac. 503.

TRIAL—APPEAL—SUBMITTING ISSUES OUTSIDE THE PLEADINGS.

Care should be exercised to instruct juries only as to matters covered by the pleadings, and instructions on issues not so fixed are erroneous, justifying a reversal, even though the evidence on which the instruction is based was received without objection.

From Clackamas: THOMAS A. McBRIDE, Judge.

Statement PER CURIAM.

This is an action by A. E. Latourette, "trustee," against H. H. Johnson, Henry Meldrum, Thomas Charman and J. T. Apperson to recover the amount of a promissory note executed by the defendants to the plaintiff November 29, 1896, for the sum of \$2,707, payable in six months, with interest from date until paid at the rate of 10 per cent per annum. The complaint is in the usual form, and from a copy of the note set out therein it appears that the defendants agreed to pay a reasonable sum as attorney's fees in case action should be instituted to collect the note or any part thereof, and that Charman and Apperson severally appended, after their signatures, the word "Security." Johnson and Meldrum, jointly answering, denied the material

allegations of the complaint, and for a further defense stated that the defendants executed the note mentioned, and at the time it was given it was agreed by the parties thereto that in all matters relating to the payment thereof C. D. and D. C. Latourette were and should continue to be plaintiff's agents, and that the note should be taken in her name to enable them to receive from the defendants a bonus and commissions for making and caring for the loan in addition to the highest rate of interest allowed by law, and that the money furnished was at all times the property of the agents; that it was further agreed by the parties that, as between themselves, Johnson and Meldrum were principals as to two-thirds and one-third, respectively, of the sum stated in the note, and that Charman and Apperson were only sureties thereon, which the plaintiff and her agents at all times well knew; that on or about June 30, 1897, and after the note had matured, Johnson and Meldrum, desiring to secure an extension of time for the payment thereof, entered into an agreement with plaintiff's agents whereby Johnson and one Harold A. Rands assigned to such agents for their principal the right to collect from the United States a sum of money to be paid the assignors for surveying public lands in Idaho, pursuant to a contract therefor, entered into May 6, 1897, upon which there subsequently became due \$6,981.36; that such transfer was made June 30, 1897, without the knowledge or consent of Charman or Apperson, and evidenced by an irrevocable power of attorney, in which it is stated that the written authorization to act for the persons giving it was made in consideration of money borrowed from the attorneys in fact, which is the sum loaned to the defendants and for which the note was given; that at the time the transfer was made the entire beneficial interest in the contract and the proceeds accruing therefrom belonged to Johnson, as was then well known to the plaintiff and her agents, who agreed with him and Meldrum that the sum to be collected for making the survey should be received and applied in full satisfaction of the note sued on, the time for the payment of which was extended in consideration

of the execution of the power of attorney and of the assignment of the contract; that, pursuant to the transfer, the plaintiff and her agents collected from the United States \$6,981.36, which was in excess of the amount of the note described in the complaint, but, notwithstanding their agreement to apply the money so received on that obligation, they appropriated the whole thereof to other notes made by Johnson, to which the codefendants herein were not parties, without his or their knowledge or consent, and that by reason thereof the note sued on has been fully paid.

Charman and Apperson, jointly answering, pleaded for their first defense substantially the same facts as are alleged by Johnson and Meldrum. For a second defense they repeated several averments of their preceding answer, and alleged that on or about June 30, 1897, and after the note sued on had matured, the plaintiff, for a valuable consideration to her paid by Johnson, and without the knowledge or consent of Charman or Apperson, entered into an agreement with him whereby she extended the time of the payment of the note mentioned until her agents could collect from the United States the money due for making the survey, which sum they were to receive in payment of the note in question. For a third defense, the prior averments referred to are repeated, and it is alleged that, when the note sued on matured, Johnson and Meldrum were severally solvent, as the plaintiff then well knew; that after the note became due these defendants, without any knowledge or notice that the time for the payment thereof had been extended, requested the plaintiff's agents to collect the sum due thereon from the principals, but they refused to comply therewith, and represented that they had accepted from Johnson an assignment of the surveying contract, and that the money to become due thereon was in excess of the amount of the note, upon which representations Charman and Apperson relied and were prevented from taking any action against the principals until they had severally become insolvent; that, pursuant to the assignment of the surveying contract, the plaintiff received from the United States a

sum of money largely in excess of the amount of such note, and that by reason of the representations referred to the plaintiff is, and of right ought to be, estopped to claim that the note or any part thereof is due or payable. The allegations of new matter in the several answers were denied in the replies, and, when the cause was tried, the jury found in favor of Charman and Apperson, but against Johnson and Meldrum, for the amount of the note and attorney's fees, and from the judgment rendered on the verdict the plaintiff appeals from that part which exempts Charman and Apperson from liability, and Johnson and Meldrum also appeal from that part which awards any sum against them.

REVERSED.

For appellant there was a brief over the names of *William Wick Cotton* and *C. D. & D. C. Latourette* and *W. A. Robbins*, with an oral argument by *Mr. Cotton*.

For respondents and cross-appellants there was a brief over the names of *William David Fenton*, *Harvey Edwin Cross* and *E. S. J. McAllister*, with oral arguments by *Mr. Fenton* and *Mr. Cross*.

PER CURIAM. The bill of exceptions narrates that the defendant Johnson and one Harold A. Rands entered into a contract with the United States whereby they were to survey public lands in Idaho, and, desiring to secure money to enable them to comply with the terms of their agreement, they on June 30, 1897, executed to C. D. and D. C. Latourette an irrevocable power of attorney, in which it is stated that the instrument was given for money borrowed from them. The contract with the general government was also assigned at the same time to the attorneys in fact by a written instrument, which, omitting the signature of the parties and the date of execution, is as follows:

"This Memorandum of Agreement, made between H. H. Johnson and Harold A. Rands, parties of the first part herein, and C. D. and D. C. Latourette, parties of the second part herein, witnesseth:

That, Whereas, the said first parties are desirous of negotiating a loan through the said parties of the second part, said par-

ties of the first part giving therefor their personal obligation, together with contract No. 186 with Joseph C. Strangham, U. S. Surveyor General for Idaho, date May 6, 1897, approved June 1, 1897, by Hon. Binger Hermann, Commissioner of the General Land Office at Washington, D. C.; and

Whereas, the parties of the first part herein have assigned, and do by these presents hereby assign, the said contract to C. D. and D. C. Latourette, as trustees, to secure the payment of certain moneys, and have duly executed, acknowledged and delivered to the said C. D. and D. C. Latourette their certain power of attorney, authorizing and empowering the said parties of the second part to collect any money that may be heretofore due upon said contract.

Now Therefore, the said parties of the first part, in consideration of the securing of the said loan by the said second parties and for the further consideration of \$1 to said first parties in hand paid, do hereby agree that when said second parties shall receive any money on said contract by virtue of this assignment or by virtue of said power of attorney, then the said second parties shall from said money pay first the loan secured by them for the said parties of the first part, and any note given in renewal thereof, and after the payment of the said sum or sums, any balance remaining over from said collection of said contract may be by the said second parties applied to the payment of such debt or debts owed by the said H. H. Johnson at the time of such collection, held by the Commercial Bank of Oregon City, and such debt or debts of the said H. H. Johnson held at the law office of C. D. and D. C. Latourette, as the second parties may see fit, paying the balance, if any, to the said first parties, or their assigns or representatives.

But It Is Further Understood that, before any payments shall be made by the said second parties of the money to be received on the said contract, the said second parties may before making any other payments retain or keep any sum or sums that they may have expended, or any reasonable compensation for any services performed by reason of said power of attorney, or said assignments of said contract."

The court certifies that the sum of money thus attempted to be secured, but not definitely stated in the power of attorney or agreement, was \$1,700; that, when such loan was negotiated, Johnson's name appeared as a maker on promissory notes held by the bank mentioned or by the attorneys in fact, amounting

to \$7,782, including the note described in the complaint; that they thereafter loaned him \$660, secured from one R. Scott, taking a promissory note therefor, and also paid orders which he drew on them in favor of laborers employed in making the survey, amounting to \$1,525.98; that the attorneys in fact received from the United States in March and April, 1899, in full payment of Johnson's work, the sum of \$6,981.36, which they applied in discharging the loans made, the orders drawn, certain fees of their own, interest and exchange, amounting to \$4,398.16, leaving \$2,583.20, which they used in paying certain notes signed by Johnson and held by themselves or by the Commercial Bank of Oregon City; but no application of any part of the money so obtained was made to the note sued on; that on June 30, 1897, they and the bank also held other notes, upon which Johnson's name appeared as a maker, aggregating more than \$3,000, no part of which was paid from the money so received; that Johnson, in settling the account with the attorneys in fact, accepted from them, without objection, the notes and orders which they had paid, but, as he was surety only on a part of the notes, he left the obligations on which he was secondarily liable with them for collection, if possible, from the principals. The bill of exceptions further states that Johnson, as a witness in his own behalf, testified that after June 30, 1897, when the written agreement was executed, he requested the attorneys in fact to employ the money to be secured from the United States in discharging the note described in the complaint, and that they assented thereto. He also deposed that at no time were the attorneys in fact prevented from appropriating the money to be received on account of making the survey in discharging the note for \$1,700, given for money borrowed from them, in liquidating the loan of \$660 made by R. Scott, or in paying the orders, amounting to \$1,525.98, issued to the laborers employed; but that all these demands were to be settled before any of the money was to be applied on the note described in the complaint.

The court, in charging the jury in relation to the plaintiff's

alleged extension of time for the payment of the note sued on, as set out in the second defense of Charman and Apperson, said:

"I will state right here now, in regard to that, that the law requires that the time shall be definite, and the extension shall be for a valid consideration. Neither of these is pleaded here, nor is there any proof of any definite extension, and, as far as that is concerned, as to extending the time on the note, you will not consider it."

In speaking of the third defense, as hereinbefore set out, the court further charged the jury as follows:

"There was no evidence that Latourette at that time promised to release the defendants Apperson or Charman, or either of them, from the payment of this note; no evidence that he ever intimated to them in any way that they would be released from the payment of the note in suit. The only evidence was that he intimated to them that the contract would be sufficient security for the new notes they might give (in lieu of the note described in the complaint), and, as they did not give any new notes, they cannot claim to have been misled in this case, and that estoppel is not good."

The court, instructing the jury as to the first defense, said in effect that if they should find at any time after June 30, 1897, when the surveying contract was assigned, that the plaintiff's agents verbally agreed with Johnson that with the money to be received from the United States, they would, after paying the sum of \$1,700 loaned, advances, orders and such other expenses as they were required to defray, discharge the promissory note described in the complaint, and, if the money which they secured from the general government was sufficient for all such purposes, then the receipt thereof by the plaintiff's agents for their principal should be deemed a payment of the note sued on, as to all the defendants. An exception to the latter instruction was taken by plaintiff's counsel, who contend that an error was committed in giving it. It will be remembered that the several answers state that on or about June 30, 1897, and after the note sued on had matured, the time for the payment thereof was extended according to the terms of a power of attorney which stipulated that it was given in consideration of money

borrowed from the attorneys in fact, which sum is the money loaned to the defendants and evidenced by the promissory note described in the complaint. This averment is shown to be false by the court's certificate that the sum of money referred to in the power of attorney was \$1,700. It is to be inferred from an examination of the bill of exceptions that the defendants' counsel had not seen the written agreement, a copy of which is hereinbefore set out, until the trial, when it was produced by plaintiff and offered in evidence. It would seem that Johnson, who is a party to that agreement, and from whom the defendants' counsel evidently secured the information that supposedly enabled them to prepare their answers, had forgotten the written agreement, the terms of which unquestionably authorized the attorneys in fact, after paying the sums specified, to apply the remainder of the money to be received from the United States upon any debts due from Johnson and held by them or by the bank that they might elect.

After the contract had been received in evidence, Johnson, as a witness in his own behalf, was asked on direct examination, if subsequent to June 30, 1897, the attorneys in fact or either of them agreed with him that the note described in the complaint should be treated as one of the negotiable instruments specified in the written agreement, to which he replied: "That was the understanding." He further testified more in detail concerning the agreement to pay the note sued on from the money to be received from the general government, whereupon the plaintiff's counsel moved to strike out the answers of the witness, on the ground that they were immaterial and irrelevant, because no modification of the contract of June 30, 1897, had been alleged as a defense to the action. The motion was denied, but no exception to this action of the court appears to have been taken. The testimony of this witness is apparently corroborated by that of the defendant Apperson, who, as a witness in his own behalf, testified that some time after the note described in the complaint matured, one of the attorneys in fact requested him to join the other makers in executing a renewal

note, saying that he would incur no liability thereby, because the money to be received from Johnson, on account of the surveying contract that had been assigned, would be sufficient to discharge the obligation; but Apperson refused to comply therewith, assigning as a reason therefor that, if the sum of money to be received was ample for the purpose stated, no necessity existed for the giving of a new note. The attorneys in fact, as witnesses for the plaintiff, severally testified that no agreement was entered into with either of the defendants herein, whereby any part of the money to be received from the United States was to be credited on the note sued on, and based on such contradictory evidence the court gave the instruction hereinbefore noted, to which an exception was reserved.

It is argued by counsel for Charman and Apperson that while the written agreement of June 30, 1897, gave the attorneys in fact the right to wait until receiving the money from the United States before electing the debt or debts owed by Johnson and held by them or by the bank which should be discharged, such right was a mere privilege which they could waive, and if, before receiving the money, the note sued on was selected to be paid therefrom, and an agreement to that effect was entered into with Johnson, the assent was an appropriation of the funds to the payment of that promissory note, which, as the court properly charged, liberated the principals and the sureties from liability thereon. The legal proposition insisted upon, if assented to, would permit the judgment rendered in favor of Charman and Apperson to rest upon a modification of the agreement of June 30, 1897, without an averment of that fact in the answers, in the absence of which it must be conceded as true that the plaintiff had no knowledge thereof and was not prepared to meet such an issue. It is evident from the averments of the several answers that the defendants relied on the original written agreement as affording a defense to the action and not on any verbal modification thereof, and in such case the question to be considered is whether the court erred in charging the jury as to a fact not in issue, though no exception was taken to the intro-

duction of testimony tending to establish such fact. In *Coos Bay R. Co. v. Siglin*, 26 Or. 387 (38 Pac. 192), it was held to be reversible error to charge as to an issue not made by the pleadings, though evidence as to the controverted fact was received without objection. It has been repeatedly held that an instruction outside the issues is erroneous, and, if excepted to, the giving thereof in such case is sufficient ground for reversal on appeal: *Hughes v. McCullough*, 39 Or. 372 (65 Pac. 85); *Carson v. Lauer*, 40 Or. 269 (65 Pac. 1060); *First Nat. Bank v. McDonald*, 42 Or. 257 (70 Pac. 901). The several answers failed to allege that the contract of June 30, 1897, had been modified in any manner, and for that reason the instruction objected to is erroneous.

It seems inexplicable that under such an instruction the jury should have found in favor of Charman and Apperson and against Johnson and Meldrum, and we conclude that the cause of justice will be promoted by reversing the judgment and granting a new trial, which are ordered. REVERSED.

Decided 25 June, 1907.

STATE v. CONNOLLY.

90 Pac. 902.

JUSTICES COURT—HOW TO APPEAL IN CRIMINAL CASE.

1. Under the provisions of Sections 2240, 2292 and 2298, B. & C. Comp., regulating the giving of notices of appeal in criminal cases before justices of the peace, the only method of showing that a notice of appeal was given in such a case in open court, which may be done, is by the justice's docket, where the fact that such a notice was so given is required to be recorded.

MOTION FOR RULE TO SUPPLY DEFECTIVE RECORD—SUPPORTING EVIDENCE.

2. A motion to require alleged omissions in a record to be supplied should be accompanied by some showing that the facts justify the action asked.

A motion to complete a diminished transcript by adding the facts regarding the giving of notice of appeal, is discreetly denied where there is no showing that any such notice was actually given or any entry concerning it made in the records of the trial court.

From Grant: GEORGE E. DAVIS, Judge.

Pat Connolly was convicted of a misdemeanor in a justice's court and appealed to the circuit court, where the appeal was dismissed. He now further appeals to this court.

AFFIRMED.

For appellant there was a brief with an oral argument by *Mr. Victor G. Cozad*.

For the State there was a brief over the name of *J. W. McCulloch*, District Attorney, with an oral argument by *Mr. Andrew Murray Crawford*, Attorney General.

Opinion by MR. CHIEF JUSTICE BEAN.

On August 4, 1906, there was filed in one of the justices' courts in Grant County an information charging the defendant with knowingly and wantonly moving two bands of sheep from Malheur County into Grant County without first having obtained a permit therefor, as required by Section 4277, B. & C. Comp. Connolly was arrested, tried, convicted and sentenced to pay fine of \$150 and costs. From this judgment he attempted to appeal to the circuit court, but, on motion of the district attorney, the appeal was dismissed, because, among other reasons, no notice of appeal had been given or served upon the district attorney or private prosecutor. He appeals to this court.

1. The transcript from the justice's court does not contain a notice of appeal, nor a copy of an entry in the justice's docket, showing that oral notice had been given. Accompanying the transcript was a letter or certificate from the justice, addressed to the county clerk, stating that the defendant gave verbal notice of appeal in open court; but this is not sufficient. An appeal in a criminal action in a justice's court is taken in the same manner as an appeal from a judgment in a civil action, except that the notice must be served upon the district attorney or private prosecutor: Section 2292, B. & C. Comp. An appeal in a civil action is taken either by giving oral notice in open court at the time of the rendition of the judgment, or at any time within 30 days thereafter by serving a written notice on the adverse party or his attorney, and filing the original with the

justice, with proof of service indorsed thereon, and by giving an undertaking for costs and disbursements: Section 2240. Section 2198 provides that the justice must enter in his docket the fact of appeal having been made and allowed. Under these sections an appeal in a criminal action in a justice's court may be taken by giving oral notice in open court at the time the judgment is rendered, but this fact must be entered in the justice's docket, and the only proof of the notice is such entry.

2. The counter motion of the defendant for a rule on the justice to complete the transcript, if it had been allowed, would not have cured this defect. There was no showing accompanying the motion that the transcript was incomplete in this particular, or that notice of appeal had in fact been given, or that an entry to that effect had been made in the docket, and without some such showing there was no abuse of discretion in overruling the motion: *Hager v. Knapp*, 45 Or. 512 (78 Pac. 671).

The judgment will be affirmed.

AFFIRMED.

Argued 9 April, decided 11 June, rehearing denied 17 July, 1907.

LANDSWICK v. LANE.

90 Pac. 490.

MUNICIPALITIES—CHARTER REQUIREMENT OF RESIDENCE FOR LABORERS.

1. Section 163 of the Portland charter of 1903, providing that "no unskilled laborer not a citizen of the United States * * and who has not resided within the city for one year * * shall be employed by the city" does not apply to citizens of this country and as to them there is no residence requirement.

APPEAL—RECORD—EVIDENCE DEFORS.

2. Matters not in the record and of which the court is not authorized by statute to take judicial notice cannot be considered for any purpose.

Where the proceedings before a commission appointed to prepare a city charter, and an explanatory note issued by the commission to the voters at the time the charter was adopted, are not a part of the record on appeal, they cannot be considered in determining the construction of a provision of the charter.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE EAKIN.

This is a proceeding by mandamus brought by Thor C: Lands-
wick against Harry Lane, mayor of Portland, and the members

of the Civil Service Commission. A demurrer to the alternative writ was sustained, and the proceeding dismissed, from which the plaintiff appeals. The writ shows that C. H. McNamee and Geo. W. Snyder on December 26, 1905, made application to the commission for examination as to their fitness for employment as laborers in the street cleaning department of the city; that in their examination it appeared that they had not resided in the city for one year next preceding thereto, and after said examination, namely, on January 3, 1906, their names were placed on the register of eligible candidates for such employment, and thereafter, on the same day, plaintiff, who is also on said register for similar employment, demanded of the commission that their names be stricken from the register, for the reason that they were not eligible for such employment without a residence of one year before such registration.

Section 163 of the Portland charter provides:

"No mechanic or unskilled laborer not a citizen of the United States, who has not declared his intention to become such, and who has not resided within the city for one year next before entering thereon, shall be employed by the city. Eight hours shall constitute a day's work for all laborers, workmen and mechanics who may be employed by the city, and the minimum wages of unskilled manual laborers employed by the city shall be \$2 per day."

AFFIRMED.

For appellant there was a brief over the name of *Stivers & Beckwith*, with an oral argument by *Mr. Walter Henry Stivers*.

For respondents there was a brief over the names of *L. A. McNary*, City Attorney, *John P. Kavanaugh* and *P. L. Willis*, with an oral argument by *Mr. Kavanaugh*.

Opinion by MR. JUSTICE EAKIN.

1. The only question arising on the appeal is whether other laborers than those not citizens of the United States, who have declared their intention to become such, are eligible for employment by the city without establishing previous residence within the city for one year. Plaintiff claims that the first sentence of Section 163 of the charter includes a citizen of the United

States, as well as a person not a citizen, and that both are precluded from employment, unless they have resided within the city one year; while the defendant insists that the residence qualification applies only to persons not full citizens. This language of the section is not entirely free from difficulty. In arriving at the intention of the legislature, we may look not only at the words used, but also look to statutes *in pari materia*, and consider the general purpose of the statute and the surrounding circumstances in so far as they may tend to explain doubtful language. Section 707, B. & C. Comp., provides:

"In the construction of a statute the intention of the legislature, * * is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former."

We find that Section 311 of the charter, relating to examinations under the civil service law of applicants for places in the classified civil service, provides, among other things:

"Said examinations shall be confined to citizens of the United States who can read and write the English language, and shall be open to all such citizens who possess such qualifications as to residence, age, health, habits and moral character as may, by rule, be prescribed by the commission."

This section evidently contemplates that all citizens of the United States are eligible for employment, if otherwise qualified as disclosed by the examination, without any qualification as to residence, except such as the commission may by rule provide, and leaves to the discretion of the commission to determine the propriety of making a residence qualification for applicants who are citizens. The provisions of this section may be deemed general as to eligibility, and, if there is a special provision as to residence in conflict therewith, the latter should prevail: Sutherland, Stat. Const. (2 ed.) § 346. Yet, when the latter is ambiguous or of doubtful meaning, the former may be considered in so far as it may aid to the intention of the legislature. And thus Section 311 of the charter indicates that the legislature did not intend to prescribe in the charter a residence qualification for applicants who are citizens of the United States.

It is said in *Alexander v. Worthington*, 5 Md. 485: "The language of a statute is its most natural expositor, and where its language is susceptible of a sensible interpretation it is not to be controlled by any extraneous considerations." Sutherland, Stat. Const. § 388 says: "In construing a particular part of a statute, the whole act may be regarded, and all other acts bearing on the subject, and all extraneous circumstances which the legislature may be supposed to have had in mind may be properly taken into consideration, yet the intent which is finally arrived at must be an intent consistent with and fairly expressed by the words of the statute themselves." And Section 367 of the same work states: "When the words of a provision are plainly expressive of an intent not rendered dubious by the context, no interpretation can be permitted to thwart that intent; the interpretation must declare it, and it must be carried into effect as the sense of the law." In *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 200 (4 L. Ed. 529), the court say: "Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempted from its operation."

Construed by these rules, the residence qualification of Section 163 of the charter can only affect laborers not citizens of the United States. The subject of this sentence of the section is "no mechanic or unskilled laborer not a citizen of the United States," and the qualifying clause, "not a citizen of the United States," is restrictive and determines who are included within it, and is thereby restricted to laborers not citizens. Also, we have the two relatives connected by "and," namely, "who has not declared his intention to become such," and "who has not resided within the city for one year," clearly referring to the same antecedent. "'And who,' 'but who' or 'or who,' etc., are best used only when preceded by the same relative": Carpenter's Eng. Grammar, 87. Genung's Practical Elements of Rhetoric,

in discussing the discrimination of the antecedent of pronouns, on page 125, says: "There are two laws of thought, which, according to occasion, may aid the reader in referring the pronoun to its antecedent: One is the law of prominence, by which the pronoun is interpreted as referring to the principal subject of the antecedent clause; the other is the law of proximity, by which the pronoun is referred to the nearest subject." To the same effect is Sutherland, Stat. Const. §§ 409, 420: "Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent." In this case the import of the first relative clause discloses unequivocally that its antecedent is "not a citizen," and both relatives have the same antecedent. It is hardly possible to put any construction upon the sentence that would make it include a person who is a citizen of the United States, as well as one who is not, without changing the whole phraseology; so that, whether we construe it by the plain, common-sense reading, or with other sections *in pari materia*, or by its technical, grammatical construction, the result is the same.

2. As aids to the interpretation of this section, counsel for the plaintiff in their brief refer the court to what took place before the charter commission, who were appointed by the legislature to prepare the charter, and also to an explanatory note issued by the commission to the voters at the time the charter was adopted; but these matters are not within the record or the knowledge of the court, and therefore cannot be considered.

There being no error in the ruling of the court below, the judgment is affirmed.

AFFIRMED.

Decided 11 June, 1907.

SUMPTER RAILWAY CO. v. GARDNER.

90 Pac. 499.

ESTOPPEL TO REVOKE A PAROL LICENSE GRANTED FOR A CONSIDERATION.*
A parol license, granted for a consideration, in pursuance of which

*NOTE.—See note to *Hallock v. Suitor*, 37 Or. 9, and notes to *Stoner v. Zucker*, 113 Am. St. Rep. 301: 7 Am. & Eng. Ann. Cas. 704, and particularly p. 716, where the Oregon cases are analyzed and discussed.

REPORTER.

appreciable expenditures of money have been made, cannot be revoked at the caprice of the grantor.

Where a railroad company has extended a spur across a tract of land with at least the knowledge, if not at the request, of the owner, and thereby enabled such owner to market much valuable timber that would otherwise have been inaccessible, it will be permitted to maintain the track until the timber is also removed from an adjoining tract that all parties contemplated should be similarly logged.

From Baker: WILLIAM SMITH, Judge.

Suit by the Sumpter Valley Railway Co. against Charles and Alice Gardner for an injunction, in which it was successful, and defendants appeal. **MODIFIED.**

For appellants there was a brief and an oral argument by *Mr. Charles Elmer Norton*.

For respondent there was a brief over the name of *John L. Rand*, with an oral argument by *Mr. Vernor Wayne Tomlinson*.

Opinion by MR. JUSTICE MOORE.

This is a suit by the Sumpter Valley Railway Co., a corporation, against Charles H. Gardner and Alice, his wife, to enjoin them from interfering with the operation of a railway spur, and to establish a perpetual right of way therefor across certain land. The facts, constituting the basis of the claim asserted in the complaint, are denied in the answer, which also alleges new matter as a defense. The latter averments are denied in the reply, and on these issues the cause was tried and a decree rendered as prayed for in the complaint, from which the defendants appeal.

The testimony shows that Gardner made a homestead entry on the west half of the northeast quarter, and the west half of the southeast quarter, of section 28, in township 10 south, of range 38 east of the Willamette Meridian. About 30 or 40 acres of this land, consisting of a narrow valley through which a small stream flows, is susceptible of cultivation, and the remainder is hilly, and was originally covered with timber. Gardner built a small house and barn on the land, three acres of which he irrigated with water taken in ditches from the creek. He and his mother, who also owned timber lands in that vicinity, secured from one S. W. Dean, December 8, 1900, a right of way

to extend a railway spur across his premises to their lands, with the privilege of operating cars on such branch for the term of five years. The proof in support of Gardner's right to the homestead was rejected, whereupon his wife, on August 1, 1902, in consideration of \$400, secured from the receiver of the local land office a receipt for the premises under a claim that the land was more valuable for timber than for agricultural purposes. Thereafter Gardner stipulated to sell the timber from this land to the Oregon Lumber Company, a corporation, provided a spur from plaintiff's railway, extending from Austin to Baker City, should be constructed to the premises, so that the logs cut thereon could be transported to market. The managers of the Oregon Lumber Co. are also the controlling officers of the Sumpter Valley Railway Co., and, Gardner's offer having been accepted, a line was surveyed through the land hereinbefore particularly described, and the right of way therefor graded the entire distance by Gardner, who was paid for such service by the plaintiff, which placed ties and laid rails on the spur and operated cars thereon. All the saw logs on such land having been cut and marketed, the plaintiff was notified to vacate the premises; but, failing to comply therewith, Gardner tore up a part of the ties and rails, whereupon this suit was instituted.

Joseph Barton, the plaintiff's general superintendent, as its witness, testified that he located the line across Mrs. Gardner's land, and when it was surveyed he had a conversation with her husband, in which the custom was discussed that a person desiring to have a spur built to his land was required to grade the right of way at his own expense, and the railway company, if its agents thought it advisable, would furnish and lay the ties and rails; but, as there was so much timber growing back of the land across which the branch line was desired that could be profitably removed, the plaintiff concluded to pay for the grading. Grant Geddes, the general superintendent of the Oregon Lumber Co., as plaintiff's witness, testified that Gardner stated, when he proposed that a spur should be built, that there was so much timber to come over the line that the railway company

could well afford to pay for the grading, and that when he furnished the right of way he was doing his part. Alluding to Gardner's conversation, this witness was asked:

"Now what, if anything, did he say at the time he proposed the construction of this spur across his premises, with reference to how long the spur was to remain there or otherwise?"

To which he replied:

"He said that the spur would necessarily have to be there for some time, as it would want to bring out all the timber that was behind him.

Q: What did he say with reference to it remaining there for that length of time, or otherwise?

A. He gave me to understand that it was perfectly agreeable for it to remain there that length of time, perfectly agreeable."

An examination of the testimony convinces us that the spur was put in pursuant to Gardner's stipulation that the line of railway should be used, as constructed, until all the timber growing on land situated back of his wife's premises and accessible by the spur could be cut and carried to market on plaintiff's cars. No agreement, however, to that effect was entered into with Mrs. Gardner; but she knew that the railroad was being constructed, and made no objection thereto. As a witness in her own behalf, she testified, on cross-examination, that, knowing her husband was cutting the timber from her land, she did not try to prevent him from doing so. In referring to him, she was asked:

"You knew of his wanting this right of way across the land—wanting this track put in there to get out these logs?"

She replied:

"I knew the track was put in there.

Q. And you knew that he wanted it put in there?

A. Yes, I knew all about that."

It does not appear that Mrs. Gardner expressly authorized her husband to permit the plaintiff to build the spur across her land, but we think it is fairly inferable from the testimony that he was empowered to do so. While he claimed the premises as a

homestead, he negotiated for a right of way for a spur thereto, and, after his wife secured the land, he at all times treated it as his own by cutting and removing the timber therefrom. This circumstance tends to show that he was authorized to represent her in all matters relating to the premises, and, in view of her conduct, we believe she is equitably bound by his acts.

Whatever the rule may be in other jurisdictions, it is settled in this state that, if a party, for a consideration, makes valuable improvements on the real property of another, pursuant to a parol agreement with the owner thereof, upon the faith of which he has relied, the license cannot thereafter be revoked to the prejudice of the party making the improvements: *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808, 25 Pac. 378; 10 L. R. A. 484); *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10); *Bowman v. Bowman*, 35 Or. 279 (57 Pac. 546); *Lavery v. Arnold*, 36 Or. 84 (57 Pac. 906, 58 Pac. 524); *Hallock v. Sutor*, 37 Or. 9 (60 Pac. 384). The benefit derived by the defendants from the sale of their logs, which they were enabled to market after the spur was constructed, affords a consideration for the parol agreement on the faith of which the plaintiff relied, and, this being so, they will not be permitted to revoke the license during the term for which it was granted. We do not think that such right should be perpetual or exercised longer than necessary to remove the timber contemplated when the agreement was consummated. What that term should be is conjectural, for no direct testimony was given on the subject. It appears, however, that the plaintiff secured from Dean a five years' extension of the right granted to Gardner and his mother, whose authority expired December 8, 1905, and it will be assumed that the time specified in such renewal is ample for that purpose.

The decree will therefore be modified, and one entered here granting the plaintiff a right of way across the defendants' premises until December 8, 1910, 'during which time they will be restrained from interfering in any manner with the operation of the spur as constructed.

MODIFIED.

Argued 4 June, decided 18 June, 1907.

KRAMER v. MARSH.

90 Pac. 583.

APPEAL—ILLUSTRATION OF ADVERSE PARTY.

Where certain land on which plaintiff attempted to impose a lien had been sold under a bond for a deed, and the vendors successfully contested the rights of the vendee in the premises, and also defeated plaintiff's claim of lien, such vendee is an adverse party on whom notice of appeal taken by plaintiff must be served.

From Marion: WILLIAM GALLOWAY, Judge.

Suit by Willis Kramer and others against Canfield Marsh and others. From a decree dismissing the suit as against plaintiffs, they appeal. On motion to dismiss. **DISMISSED.**

Mr. George Greenwood Bingham for the motion.

Mr. Charles Edwin Lenon contra.

Opinion by MR. JUSTICE MOORE.

This is a motion to dismiss an appeal. A suit was commenced against Canfield Marsh, Sophia, his wife, and Lester W. Humphrey, to recover from the former a sum of money, and to impress a lien therefor on an undivided one-fourth interest in certain real property situate in Marion County, which premises Marsh and his wife had covenanted, in a bond for a deed, to convey to their codefendant, for \$1,000, evidenced by Humphrey's promissory note, which stipulated for the payment of that sum in installments of \$83.33 each, the first becoming due December 30, 1904, and others maturing every three months thereafter until September 30, 1907, when the final payment was to be made, and a deed executed. The note further provided that, if default were made in the payment of any installment when it matured, the remainder of the purchase price of the land should immediately become due and collectible, at the option of the holder of the note, upon which the following are the only payments that have been made, to-wit: February 14, 1905, \$98.35; and May 29 of that year, \$97.08. Marsh and wife, answering separately, deny the material allegations of the complaint, and,

in their reply to Humphrey's answer, aver that, by reason of his failure to pay the installments agreed upon, the bond for a deed has become and is rendered void, and pray that he be directed to pay the remainder of the purchase price within 60 days from the time the decree is given, and that in default thereof his interest in the real property may be barred and foreclosed. The cause was tried and a decree rendered against Humphrey, as prayed for in the reply; but the suit was dismissed as to the plaintiffs, who attempted to appeal by serving a notice thereof upon Marsh and his wife; but no notice of appeal was served upon or given to Humphrey, and for this reason it is contended by respondent's counsel that no jurisdiction of the cause was obtained.

The question to be determined is whether or not Humphrey is an adverse party. The statute provides that, if an appeal is not taken at the time the decision complained of is rendered, the party desiring to review the judgment or decree may cause a notice of appeal to be served upon such adverse party or parties as have appeared in the action or suit: B. & C. Comp. § 549. An adverse party is a natural or an artificial person by or against whom an action or suit is brought, and whose interest, in relation to the judgment or decree rendered therein, is in conflict with a modification or reversal thereof by an appeal therefrom: *The Victorian*, 24 Or. 121 (32 Pac. 1040; 41 Am. St. Rep. 838); *Bennett v. Minot*, 28 Or. 339 (39 Pac. 997); *Alliance Trust Co. v. O'Brien*, 32 Or. 333 (50 Pac. 801); *Cooper Mfg. Co. v. Delahunt*, 36 Or. 402 (51 Pac. 649). The notice of appeal was not served until nearly six months after the decree was rendered, and whether or not Humphrey, within the 60 days limited therefor, paid the amount of the note and secured a deed to the premises, or neglected to comply with the court's direction in that particular, is not disclosed. The decree recognizes his right to the land, and concedes that Marsh holds the legal title thereto, which is to be transferred to him upon the payment of the remainder of the purchase price. If the decision sought to be reviewed is reversed or modified, and a decree rendered in

this court, awarding any sum against Marsh, as prayed for by the plaintiffs, and declaring such recovery to be superior to the equitable interest of Humphrey in the premises, as alleged in the complaint, the specific charge thus imposed on the land would necessarily tend to impair his estate therein, unless he has abandoned all claim thereto, which is not apparent from an inspection of the transcript. This being so, he is an adverse party, and the appeal is dismissed.

DISMISSED.

Decided 18 June, 1907.

BINHOFF v. STATE.

90 Pac. 586.

TRESPASS—INFORMATION—PLEADING EXCEPTIONS.

1. An information under a statute containing exceptions must show that the person charged is not within such exceptions.

An information for trespass, drawn under Section 1830, B. & C. Comp., providing that if any person other than an officer on lawful business shall go upon any premises not his own, etc., he shall be guilty of a misdemeanor, must show affirmatively that the person charged was not such officer, and that he did not own the premises.

TRESPASS—SUFFICIENT ALLEGATION OF OWNERSHIP.

2. An information for trespass in which it is alleged that the premises in question were owned by a named person other than defendant does not show that defendant may not have been the owner and therefore not guilty under Section 1830 of B. & C. Comp., for the word "owner" has a variety of meanings, some of which do not include a fee-simple estate.

TRESPASS—MEANING OF WORD "OWNER."

3. The term "owner," as used in B. & C. Comp. § 1830, prohibiting a trespass by one not the owner of the land nor an officer on lawful business, is not limited to the holder of the fee-simple estate, but also includes one holding merely a usufructuary interest.

From Union: ROBERT EAKIN, Judge.

Statement by MR. COMMISSIONER SLATER.

Frank Binhoff was arrested and convicted in the Justice's Court for South La Grande District, Union County, on the following complaint: "Frank Binhoff, the above-named defendant, is accused by this complaint of trespass on inclosed lands committed as follows: That the said defendant, Frank Binhoff, did, in the County of Union, State of Oregon, on the 18th day of July, 1906, wrongfully and unlawfully enter, go and

trespass upon certain inclosed lands and premises, then and there the property of one J. D. McKennon, without any permission to so or at all enter or go thereon, and, after being notified by the said J. D. McKennon to not go or enter upon said inclosed premises, the same being more particularly described," etc.

After verdict plaintiff moved for arrest of judgment, basing his motion upon the contention that the complaint did not state facts sufficient to charge a breach of the statute. On the overruling of his motion, plaintiff was sentenced to pay a fine of \$15, and thereupon he petitioned the circuit court of that county to review and set aside the judgment of the justice's court. The petition being dismissed, he appeals to this court.

REVERSED.

For appellant there was a brief with an oral argument by *Mr. Eugene Ashwill*.

For the State there was a brief over the names of *Andrew Murray Crawford*, Attorney General, and *F. S. Ivanhoe*, District Attorney, with an oral argument by *Mr. Crawford*.

Opinion by MR. COMMISSIONER SLATER.

The material part of Section 1830, B. & C. Comp., under which the complaint in this case was made, provides:

"If any person other than an officer on lawful business shall go or trespass upon any inclosed lands or premises not his own, and shall fail, neglect or refuse to depart therefrom immediately and remain away until permitted to return upon the verbal or printed or written notice of the owner or person in the lawful occupation of said lands or premises, such trespasser shall be deemed guilty of a misdemeanor," etc.

The deficiency of the complaint material to be considered is contended by plaintiff to be that it does not allege (1) that the defendant at the time of the trespass was not "an officer on lawful business"; (2) that the lands and premises on which the defendant is charged with having entered were not his own.

1. It is clear that the statute in question defines an act which is to become a crime only when committed by persons of a particular class, and under particular conditions. Under such cir-

cumstances it is necessary that the complaint or indictment show that the accused is not one of the class included, and that the particular conditions exist. The excluding words of the statute, viz., "other than an officer on lawful business," are included in, and are an essential ingredient of, the description of the persons who may commit the offense. All persons are not within the interdiction of the law, but only such as are not "an officer on lawful business." In an indictment under the Mississippi act of 1830, prohibiting any persons, other than Indians, from making settlements within their territory, it was held necessary in *State v. Craft*, 1 Walker (Miss.), 409, to aver that the defendant was not an Indian. It was necessary, therefore, that the indictment or complaint should negative the exception in the statute that the accused was "an officer on lawful business": *State v. Clements*, 15 Or. 237, 247 (14 Pac. 410); *State v. Tamler*, 19 Or. 528 (25 Pac. 71; 9 L. R. A. 853); Wharton, Crim. Pl. & Pr. (8 ed.) 240.

As to alleging the conditions under which the offense may be committed, the complaint or affidavit which is to be the basis of a warrant for the arrest of one charged with committing a criminal trespass must contain allegations which are sufficient in substance to meet the statutory provisions, and must set forth every substantial matter with the certainty which is required in an indictment (21 Pl. & Pr. 881); and, where the statute denounces only acts done under particular conditions or between certain dates, the exceptions and provisos in the statute constitute a material part of its descriptive ingredients, and it is necessary to negative the exceptions. Within this rule it was incumbent upon the state to allege that the defendant went or trespassed upon inclosed lands or premises not his own.

2. This was not done in express terms, but it is claimed that the rule has been substantially complied with by alleging in the complaint that the trespass was upon "certain inclosed lands and premises then and there the property of J. D. McKennon." Is this equivalent to saying that the defendant trespassed upon lands not his own? We think not. An owner of a thing is he

who has dominion over it including the idea of the right of possession: Anderson, Law Dic. "Owner." The word "owner," as applied to land, has no fixed meaning which can be declared to be applicable under all circumstances and as to any and every enactment. It usually denotes a fee-simple estate, but it has been defined to be "one who has the usufruct, control or occupation of land with a claim of ownership, whether his interest be an absolute fee or a less estate": *Coombs v. People*, 198 Ill. 586 (64 N. E. 1056). It may include no more than a tenant for a term of years: *State v. Wheeler*, 23 Nev. 143 (44 Pac. 430); *McKee v. McCardell*, 22 R. I. 71 (46 Atl. 181); *Parker v. Minneapolis & St. L. R. Co.* 79 Minn. 372 (82 N. W. 673).

In *State v. Burns*, 123 Ind. 427 (24 N. E. 154), the defendant was charged with having unlawfully entered upon the lands of John R. Newman after having been forbidden by Newman, who was the lawful occupant of the land. To this charge the defendant interposed a special denial to the effect that at the time of the alleged entry the lands did not belong to Newman, but were owned in fee simple by Elias Thomas. It was held that as a special plea in bar the answer was manifestly insufficient. Mr. Chief Justice MITCHELL says: "If Newman was in possession as tenant under a lease, it was proper to charge that the entry was made upon his land; and it was no defense to answer that Thomas was the owner of the fee. One who is in the exclusive possession of real estate as tenant under a lease is, during the continuance of his tenancy, to all intents and purposes the owner, and may maintain an action against a wrongdoer, which cannot be defeated by showing the title in some one other than the plaintiff: *McCrillis v. State*, 69 Ind. 159. A tenant in possession is deemed the owner in law: *Kennedy v. State*, 81 Ind. 379."

3. The term "not his own" is an exclusive negative, denying any right, however small, and when used, as here, in a statute defining and punishing trespass upon land, is intended to exclude any right of the usufruct, control, occupation or of entry. While the expression used in the complaint, viz., "the property

of J. D. McKennon," does not assert an exclusive title in him, but asserts no more than he possesses some sort of title therein, either the fee or something less than the fee, which whatever it may be may or may not be joined with the present right of possession and control of the premises. The accused might have been the owner of a lease for a term of years from a former possessor of the title, or even under McKennon, whose property the premises are said to be, and both rights could be said to exist at the same time. The accused, in that event, could be said to be the owner in the sense of having the present right of the usufruct, control, occupation, and hence of entry thereon, while the premises would be the property of another. For this reason the allegation to the effect that the premises are the property of another does not negative the statutory requirement of alleging that they are "not his own."

It follows that the judgment of the lower court should be reversed, and the cause remanded, with instructions to set aside the judgment of the justice's court, and dismiss the complaint.

REVERSED.

Decided 25 June, 1907.

TAYLOR v. BROWN.

90 Pac. 673.

REPLEVIN—RIGHTS UNDER ACTUAL POSSESSION.

1. Actual possession of property is sufficient to sustain a replevin action against one who has seized it wrongfully, without regard to any paper title.

REPLEVIN—PLEADING SEIZURE UNDER WRIT OF ATTACHMENT.

2. An officer who attempts to justify the seizure of property found in the possession of a stranger to his writ must both plead and show facts necessary to support the writ, which was not done in this case, and the record of the attachment was properly excluded.

REPLEVIN—AFFIDAVIT FOR WRIT AS EVIDENCE—AIDING ANSWER.

3. The affidavit filed by a plaintiff in replevin, stating the alleged cause of the detention of the property by defendant, is not a pleading, and therefore cannot aid a defective answer.

PLEADING—AMENDMENT—DISCRETION OF COURT.

4. In replevin against attaching officers, it is not error to deny their application made during trial to amend their answer by pleading the attachment proceedings, such application being addressed to the sound dis-

cretion of the trial court, and its ruling not being reviewable except for abuse of such discretion.

ADMISSIBILITY OF QUESTION CALLING FOR AN OPINION.

5. In replevin by one in possession of machinery attached as belonging to another, the question asked plaintiff, "Could any reasonable person doing business with" the attachment defendant, "in supplying parts of machinery for the machine, know that you controlled it?" was properly excluded as calling for witness' mere opinion, and not for any pertinent facts.

EVIDENCE—DECLARATIONS OF THIRD PERSONS.

6. Statements by third persons not in the presence of the party against whom they are offered are not competent evidence.

From Baker: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by A. J. Taylor against H. K. Brown and J. B. Snow to recover possession of certain well-boring machinery of the alleged value of \$2,000. The complaint sets up title and right to possession in the plaintiff, wrongful and unlawful detention by the defendants, and a demand and refusal. The answer is a mere denial of the averments of the complaint. The plaintiff, to sustain the issue on his part, gave evidence tending to show that on January 9, 1902, one Chas. Frederick, being the owner of the property in question, in the State of Washington, executed and delivered to him a bill of sale therefor to secure the payment of a promissory note for \$1,082.32, due 12 months after date; that the bill of sale was duly recorded in the State of Washington, and plaintiff took immediate possession of the property. Thereafter Frederick, by the permission and consent of the plaintiff, operated the property, but was assisted by the plaintiff's son, who acted as his agent, and whose consent was necessary to its removal by Frederick from place to place. In November, 1904, the property was, by plaintiff's consent, brought into Oregon by Frederick for operation near Baker City, the plaintiff's son accompanying it to assist in its operation and to look after and protect his father's interest. While the property was thus being operated, it was seized by the defendants, as sheriff and deputy sheriff, under a writ of attachment in an action brought by one Schumaker against Frederick. The court below refused to admit evidence of the attachment proceedings

because not pleaded, and ruled that the bill of sale from Frederick to the plaintiff, while good between the parties, was not sufficient evidence of title in plaintiff to enable him to maintain this action, and instructed the jury that, unless they found from the testimony that plaintiff was in the actual possession of the property at the time of its seizure by the defendants, their verdict must be for defendants. The jury returned a verdict in favor of the plaintiff, and from a judgment rendered therein the defendants appeal. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600. **AFFIRMED.**

For appellants there was a brief over the name of *Emmett Callahan*.

For respondent there was a brief over the names of *Albert Backus* and *Lawrence E. Lewis*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. From the finding of the jury under the instructions of the court, it must be assumed, for the purposes of the appeal, that plaintiff was in actual possession of the property in controversy at the time it was taken by the defendants, and this is sufficient to enable him to maintain an action of replevin therefor against a wrongdoer: *Faull v. Cooke*, 19 Or. 455 (26 Pac. 662: 20 Am. St. Rep. 836); *Casto v. Murray*, 47 Or. 57 (81 Pac. 883). The court ruled and instructed the jury that the bill of sale from Frederick to the plaintiff was not sufficient evidence of title to enable him to recover in this action, but they must find for the defendants, unless the plaintiff was in the actual possession at the time the property was taken. The question of the validity of the bill of sale and its competency as evidence are therefore immaterial.

2. It is a settled law in this state that, where an officer attempts to justify the seizure of property in the possession of a stranger to the writ, he must allege and prove facts necessary to support the writ, and that the property belonged to the defendant therein: *Guille v. Wong Fook*, 13 Or. 577 (11 Pac. 277); *Lewis v. Birdsey*, 19 Or. 164 (26 Pac. 623); *Fisher v. Kelly*,

30 Or. 1 (46 Pac. 146). This rule was not observed in this case, and it was not error, therefore, for the court to refuse to admit in evidence the record in the attachment proceedings.

3. The statement in the affidavit for claim and delivery filed by the defendant, that the alleged cause of the detention of ~~the property by defendants was the seizure~~ by them under an alleged writ of attachment against Frederick, is no part of the pleadings, and cannot aid a defective answer.

4. There was no error in denying the application of the defendants, made during the trial, to amend their answer by pleading the attachment proceedings. Applications of this kind are addressed to the sound discretion of the trial court, and its ruling will not be disturbed except for an abuse of such discretion, which is not shown here: *Wallace v. Baisley*, 22 Or. 572 (30 Pac. 432).

5. There was no error in sustaining the objection to the following question propounded to the witness Taylor. "Could any reasonable person doing business with Mr. Frederick, in supplying parts of machinery for that machine, know that you controlled it?" It called for the mere opinion of the witness, and not for any facts pertinent to the case.

6. Conversations held by third persons with Frederick, not in the presence of the plaintiff or his agent, concerning the bill of sale from him to the plaintiff, were clearly incompetent, and not binding on the plaintiff.

There being no error in the record, the judgment is affirmed.

AFFIRMED.

Argued 1 May, decided 25 June, 1907.

SLOVER v. BAILEY.

90 Pac. 665.

MINERS' LIENS—RECORDING OF LEASE IN MINING RECORDS.

1. Any book kept by the proper officer as part of the records of his office, in which are recorded instruments affecting mines, is a book of "mining records" under Section 5668, B. & C. Comp., providing that miners' liens shall not attach to the interest of the owner if the work was done for a lessee whose lease was recorded in the "mining records" of the county before the work began.

RECORDING INSTRUMENTS IN DESIGNATED BOOKS.

2. If no particular book is designated in which an instrument must be recorded, it will be sufficient to record it in any book kept by the recording officer for that purpose.

From Josephine: HIERO K. HANNA, Judge.

Suit by George H. Slover against G. N. Bailey and others to foreclose sundry miners' liens, resulting in a decree as prayed for, from which defendants appeal. Submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600. REVERSED.

For appellants there was a brief over the name of *Hough & Blanchard*.

For respondent there was a brief over the name of *Reames & Reames*.

Opinion by MR. CHIEF JUSTICE BEAN.

This is a suit to foreclose sundry miners' liens for labor performed by the plaintiff and his assignors upon a group of quartz mines in Josephine County at the request and for the benefit of the defendants, Crawford, Smith and Poindexter, who were in possession under a lease or contract of purchase from the owner, which lease or contract had been previously recorded in a book designated as "Record of Mining Conveyances." The statute authorizing liens on mines in favor of laborers and materialmen provides that it shall not apply to the owner or owners when the mine is worked by a lessee, if a copy of the lease is recorded in the "mining records" of the county before the work is begun: B. & C. Comp. § 5668. The only question for decision on this appeal is whether the lease referred to was so recorded. To determine this question, it will be necessary to refer briefly to the legislation on the question of mining records.

By the law of 1866 (Hill's Ann. Laws 1892, § 3834) bills of sale and conveyances of placer or surface mining claims were required to be recorded in a book kept for that purpose by the county clerk to be called the "Record of Conveyances of Mining Claims." This section was repealed in 1898 (Laws 1898, p. 16), and the statute then enacted relating to mining claims required the locator of a quartz claim to file for record with the recorder

of the county, if there be one, who shall be the custodian "of mining records and miners' liens," otherwise with the county clerk of the county where the claim is situated, a copy of the notice of location, which shall be immediately recorded by that officer. In 1898 it was declared that mining claims shall be real estate and all conveyances and mortgages shall be subject to the provisions of law governing transfers and mortgages of realty as to this execution, recordation, etc.: B. & C. Comp. §§ 3979, 3981. In 1891 the legislature passed an act for laborers' and materialmen's liens on mining claims and prescribing the manner of their enforcement, but it provided that it should not apply to the owner of any mine where the same shall be worked by a lessee or lessees: Laws 1891, p. 76. This act was amended in 1899 (Laws 1899, p. 180) by requiring the lessor of the mine to have recorded in the "mining records of the county" where the mine is situated a copy of the lease, in order to protect him against liens for labor and material incurred by his lessee.

1. These are all the statutory provisions bearing upon the question now under consideration, and it will thus be observed that the law does not define mining records or prescribe of what they shall consist. As a consequence the County Clerk of Josephine County, soon after and about the time of the passage of the act of 1899, giving laborers and materialmen liens upon mines, opened three sets of books in which there have since been recorded all instruments filed in his office affecting the mining claims of his county. He labeled one set of these books "Miscellaneous Mining Records," afterwards changed to "Mining Records," in which he recorded location notices, water rights, affidavits of labor performed on mining claims, and the like. On one of the other sets he designated or labeled "Mining Conveyances" or "Record of Mining Conveyances," and in this there has since been recorded all agreements, contracts, options, leases and other instruments which affect the title to mining claims. The third set he labeled "Mechanics' Liens," in which liens have been recorded. The lease under which the mines were being operated at the time the labor was performed, for which

a lien is sought in the present suit, had been recorded in the book labeled "Mining Conveyances" prior to the time such labor was performed. This was the book in which it was usual and customary to record such instruments, and in our opinion such record was a compliance with the requirement of the law.

2. Where the book in which a particular instrument shall be recorded is prescribed by law, it must be recorded in such book; but, where no particular book is designated, recording it in any book kept by the officer for that purpose is sufficient: 24 Am. & Eng. Enc. Law (2 ed.), 106; *Glading v. Frick*, 88 Pa. 460; *Farabee v. McKerrihan*, 172 Pa. 234 (33 Atl. 583; 51 Am. St. Rep. 734); *McLanahan v. Reeside*, 9 Watts, 508 (36 Am. Dec. 136). It was necessary for the owner, in order to protect himself from liens for labor performed for his lessee, to have a copy of the lease recorded in the mining records; but, since the statute does not define mining records or prescribe that such instruments shall be recorded in any particular book, it was a sufficient compliance with the statute when it was recorded in a book kept by the proper officer for that purpose. The decree of the court will therefore be reversed, and the complaint dismissed.

REVERSED.

Argued 18 April, decided 25 June, 1907.

MILES v. BOWERS.

90 Pac. 905.

NOVATION—NECESSITY OF MUTUAL AGREEMENT.

1. A valid novation cannot be accomplished without an agreement of the parties to extinguish the old debt and substitute for it a new debt against another party, which is not accomplished by the mere assumption of the existing debt by a third party.

The proprietors of a business sold it and the property used therein to a corporation, which, in consideration thereof, agreed to pay a claim against them for goods sold to them and used in the business. Thereafter the sellers of such goods, for a valuable consideration, executed and delivered to the former proprietors a writing reciting that the sellers agreed "to transfer the account" to the corporation. *Held*, that the facts did not show a novation releasing the proprietors from the claim of the sellers.

CONTRACTS FOR BENEFIT OF THIRD PERSONS—ASSUMING DEBTS.

2. Where a third party receives property in consideration of which he agrees to pay certain debts of his grantor, the owners of such debts at once obtain an additional right, that of suing the grantee; but such an agreement does not release the grantor.

APPEAL—REMANDING WITH DIRECTION AS TO JUDGMENT.

3. In an action tried without a jury, where the material facts have been determined, but the conclusions are erroneous, the better practice is to remand the case with directions to enter a correct judgment rather than for a new trial.

INTEREST ON ACCOUNTS.

4. Interest on an unsettled amount or from an unsettled date is not recoverable in this state.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. COMMISSIONER SLATER.

The Z. C. Miles & Piper Co., a corporation, brought this action to recover the balance due upon an account for goods furnished defendants, H. C. Bowers and A. A. Wright, as partners, in March, 1903, of the alleged value of \$4,078.42, on which there had been paid the following amounts: April 6, 1903, \$500, April 23, 1903, \$500, and November 23, 1903, \$1,282.54, leaving due after crediting \$25.88 for goods returned, the sum of \$1,770, for which judgment is demanded, with interest from May 1, 1903, to November 23, 1903, on the sum of \$2,982.54, and from November 23, 1903, on \$1,770. The defendants answered jointly, denying all the allegations of the complaint, but affirmatively alleged in effect that the goods mentioned were sold to defendant Wright alone, who made the first two payments thereon; that on May 1, 1903, Wright sold and transferred to the Knickerbocker Hotel Co., a corporation, organized for the purpose of taking over his property, his lease of and property rights in the Knickerbocker Hotel in Seattle, Washington, for which business the goods sold by plaintiff had been bought by Wright; that the Knickerbocker Hotel Co. contracted and agreed, as a part of the consideration to be paid for the property, to assume and pay all of the outstanding debts and liabilities of Wright in connection with that hotel business, including plaintiff's claim; that on May 1, 1903, plaintiff was informed of the sale and agreement, and consented thereto, and agreed with Wright and the purchaser that, in consideration thereof, it would release Wright and accept the company as its debtor, and that plaintiff did release Wright and transferred its account to the hotel company with the latter's consent; that subsequently the

plaintiff presented for payment to the receiver for the hotel company a claim based on the account in suit, and was paid thereon by the receiver the sum of \$1,282.54. A general demurrer to the answer was interposed, which having been overruled the plaintiff replied, denying all of the affirmative allegations of the answer. A jury having been waived by the parties, the cause was tried before the court, which rendered findings to the effect that goods to the amount alleged were sold by plaintiff to the defendants as partners, and no payments had been made, except as stated in the complaint; that the Knickerbocker Hotel Co. was organized in April, 1903, under the laws of the State of Washington, and approximately one-half of the stock was issued as fully paid and nonassessable to each of the defendants; that the hotel previously conducted by the defendants was sold and transferred to the corporation in payment for their stock, and as a part consideration therefor, on May 6, 1903, the corporation assumed and agreed to pay plaintiff's claim against defendant; and that on May 14, 1903, plaintiff signed and delivered to defendants the following writing:

"Z. C. Miles & Piper Co., for and in consideration of the sum of one (\$1.00) dollar, the receipt whereof is hereby acknowledged, do hereby agree to transfer the account of H. C. Bowers and A. A. Wright, or the Knickerbocker, to Knickerbocker Hotel Co.; but nothing herein shall be construed as a waiver of our right of lien as it now exists."

Z. C. Miles & Piper Co.,

By T. S. Semple, Secy.

Dated at Seattle this 14th day of May, 1903."

From these findings the court drew the legal conclusion that the facts constituted a novation and operated as a release of the defendants, and as a substitution of the Knickerbocker Hotel Co. as debtor to plaintiff; and, based thereon, judgment was entered in favor of defendants for costs, from which plaintiff appeals, assigning as errors the overruling of the demurrer to the answer, the court's refusal to make additional findings requested by plaintiff, the making of the conclusion of law referred to, and the awarding of judgment on the findings in favor of defendants.

REVERSED.

For appellant there was a brief over the names of *Platt & Platt and Shank & Smith*, with an oral argument by *Mr. Harrison Gray Platt*.

For respondents there was a brief over the name of *Watson & Beekman*, with an oral argument by *Mr. Benjamin B Beekman*.

Opinion by MR. COMMISSIONER SLATER.

The ruling on the demurrer and the sufficiency of the findings are brought in question by the errors assigned; but assuming, for the purpose of the opinion, that the affirmative answer states a defense of novation and a release of the defendant Wright—which we do not think it does—and passing over, as unnecessary to determine, the court's refusal to make additional findings, we are of the opinion that the facts as found will not support the judgment as entered, but that a judgment in favor of plaintiff and against both defendants jointly and severally, for the amount found to be due plaintiff, is the legal sequence of the facts found.

1. The plea of novation confesses the debt, but avoids it by a release and by a substitution of a new debtor and a new debt; and hence the affirmative is upon the defendants to establish the plea, or judgment must necessarily go against them: 21 Am. & Eng. Enc. Law (2 ed.), 671. Novation is defined as the substitution of one obligation for another, and takes place either by substitution of a new for an old party or by the substitution of a new agreement between the old parties, or it may be by a change both of parties and agreement at the same time, as in the present case: 21 Am. & Eng. Enc. Law (2 ed.), 660. One of the essential elements to a novation is that there should have been an extinguishment of the old debt, and another is that there should have been a mutual agreement between all of the parties that the old debt should become the obligation of a new debtor: 21 Am. & Eng. Enc. Law (2 ed.), 662; *Kelso v. Fleming*, 104 Ind. 181 (3 N. E. 830). When the court found, as it did in the fifth finding, to the effect that the defendants sold and transferred their hotel business to the corporation in pay-

ment for their stock; that, as a part of the consideration therefor, the corporation assumed and agreed to pay the obligations incurred by defendants in their hotel business, including plaintiff's claim; and that on May 6, 1903, the corporation, by virtue of its promise, became liable for and agreed to pay plaintiff's demand—it expressly bases the consideration of the new promise upon the value of the goods and hotel business purchased, and thereby the court has also impliedly excluded from being a part of that consideration the extinguishment of the defendants' obligation and the release of the defendants. It nowhere appears, expressly or by necessary inference, that the parties to the contract of sale intended that the defendants should be released from their obligation to plaintiff; but the only legal inference deducible therefrom is that the corporation was to be and became the principal debtor, and the defendants were to be and became sureties in respect to the plaintiff's demand: *Haas v. Dudley*, 30 Or. 355 (48 Pac. 168); *Farmers' Nat. Bank v. Gates*, 33 Or. 388 (54 Pac. 205; 72 Am. St. Rep. 724); *Windle v. Hughes*, 40 Or. 1 (65 Pac. 1058); *Hoffman v. Habighorst*, 49 Or. 379 (89 Pac. 952, 91 Pac. 20).

But it is contended by defendants that on May 14, 1903, plaintiff having knowledge of the collateral agreement of May 6, 1903, by which the corporation agreed to assume and pay the defendants' debt to plaintiff, it agreed to accept the corporation as its debtor and to release defendants, and, by executing the instrument set forth in the sixth finding, did release defendants. The court, however, has made no finding other than that plaintiff signed and delivered to defendants such instruments, and, unless it follows as a necessary legal inference therefrom, it nowhere appears as a fact found by the court that plaintiff ever agreed to or did release defendants, or that it was a part of the agreement of sale between defendants and the purchasing corporation that defendants were to be released by plaintiff. Can such inference be drawn from the wording of the instrument? We think it cannot. It appears upon its face to be an agreement by plaintiff, for the consideration of \$1 received, to

transfer, and not a transfer of, the account of H. C. Bowers and A. A. Wright to Knickerbocker Hotel Co. It is wholly executory. If plaintiff has not transferred the account, the title thereto must still be in it, and to that extent there would be a breach of its contract. But it is argued in effect that the word "transfer" means an extinguishment of the liability of defendants to plaintiff, and a substitution therefor by plaintiffs of a claim against the corporation. Such meaning, however, cannot be derived from the word "transfer." "It does not include the extinguishment or satisfaction of a chose in action," says Mr. Justice FOLGER, in *Sands v. Hill*, 55 N. Y. 18, "either by payment in full or by part payment, which is taken in full satisfaction. There is no meaning of the word 'transfer' which carries the idea of an act of extinguishment, or any other idea than that of a passing over of a right of title or property in a thing from one to another."

2. The court has found that the Knickerbocker Hotel Co. bought and received defendants' goods, and, as a part of the consideration therefor, agreed to pay defendants' debt to plaintiff. The agreement of assumption inured at once to plaintiff's benefit. It was an executed consideration as to the Knickerbocker Hotel Co., and without further promise it was legally bound to pay plaintiff the amount of defendants' debt: *Baker v. Eglin*, 11 Or. 334 (8 Pac. 280); *Washburn v. Interstate Invest. Co.* 26 Or. 436 (36 Pac. 533, 38 Pac. 620); *Feldman v. McGuire*, 34 Or. 309, 312 (55 Pac. 872). This obligation on the part of the Knickerbocker Hotel Co. to pay defendants' debt to plaintiff, being absolute and not conditional, would not support a subsequent agreement by plaintiff based on such promise as a consideration to release defendants, if one were made.

The court found that the Knickerbocker Hotel Co. on May 6, 1903, assumed and agreed to pay defendants' indebtedness to plaintiff, and also found that on May 14, 1903, for the consideration of \$1 paid to it, plaintiff agreed to transfer the account of Bowers & Wright to the Knickerbocker Hotel Co.; but these are separate and independent transactions. Neither appears to be connected with or based upon the other. Each is based upon

an express consideration, which excludes the idea that one was to be the consideration for the other. The plaintiff was not a party to the former, nor was the Knickerbocker Hotel Co. a party to the latter agreement, and hence there has not been an agreement or concurrence of the minds of all parties to the release of defendants, even if the instruments in question should be given the construction asked for by them. There having been no agreement by plaintiff to release defendants and no release by plaintiff, there could not have been a novation in law as found by the court: *Kelso v. Fleming*, 104 Ind. 180 (3 N. E. 830); *Hayward v. Burke*, 151 Ill. 121 (37 N. E. 846); *Davis v. Hardy*, 76 Ind. 273.

3. The conclusion of law found by the court not being deducible from its findings of facts, the judgment based thereon cannot stand; but, the facts found being sufficient to support a judgment in plaintiff's favor, it is the better practice for this court to correct the conclusions of law by directing what judgment shall be entered: *Coulter v. Portland Trust Co.* 20 Or. 469 (26 Pac. 565, 27 Pac. 266); *Pacific Lum. Co. v. Prescott*, 40 Or. 374 (67 Pac. 207, 416). The court having found that at the special instance and request of the defendants, as partners, the plaintiff sold and delivered to them goods, wares and merchandise, and furnished labor and material of the reasonable and agreed value of \$4,078.42, and that plaintiff has not been paid said amount, except the aggregate amount of \$2,282.54, and, in addition thereto, defendants returned and plaintiff accepted and gave credit for merchandise to the amount of \$25.88, the plaintiff is entitled to judgment against each of the defendants for the balance due, viz., \$1,770.

4. The court having made no finding as to when the balance due on this account became a settled and liquidated amount between the parties, the plaintiff would not be entitled to recover anything as interest.

It follows that the judgment of the lower court should be reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff and against each of the defendants for the sum of \$1,770, with costs and disbursements.

REVERSED.

Decided 25 June, 1907.

WEST v. WASHINGTON RAILWAY CO.

90 Pac. 666.

EFFECT OF EVIDENCE CONSIDERED.

1. The evidence satisfies the court that the parties hereto entered into an agreement to lease the property in dispute with an option to the lessee to purchase it for \$1,500 as claimed by plaintiff.

CORPORATIONS—AUTHORITY OF GENERAL MANAGER—RATIFICATION.

2. Where the general manager of a corporation, who is actually in control of its business, enters into a contract on behalf of such corporation that is not evidently beyond the scope of his apparent authority, and, with knowledge of the facts, the consideration is retained by the corporation and no objection made to the contract, the legal conclusion is that the act of the manager has been approved, or that he had full authority to make the contract originally—and in either case the corporation is bound.

SPECIFIC PERFORMANCE OF ORAL CONTRACT TO SELL—WRITINGS.

3. Where a parol contract is sufficiently definite to be specifically enforceable, the right to such relief is not affected by the fact that a written memorandum of the contract subsequently prepared and signed by the vendor and tendered to the vendee for signature does not correctly state the terms orally agreed upon, since the rights of the parties were fixed before the writing was made, and the latter is only a circumstance in the general history of the controversy.

SPECIFIC PERFORMANCE—DEGREE OF PROOF REQUIRED.

4. One seeking the specific performance of an oral contract need not establish a clear and definite contract beyond a reasonable doubt, but it will be sufficient to satisfy the court that the contract was made as claimed by plaintiff.

SPECIFIC PERFORMANCE—EFFECT OF EVIDENCE.

5. In view of the inherent probability of the truth of plaintiff's claim that he was given the right to purchase the land in question, and from the fact that he took possession without objection and made permanent improvements, the conclusion is that the defendant agreed to sell as claimed.

STATUTE OF FRAUDS—EFFECT OF PART PERFORMANCE.

6. Where a lessee takes possession under a lease with an option to purchase during the term at an agreed price, complies with all the terms of the lease, and in addition makes permanent improvements, there is such a part performance of the option as to dispense with the requirements of the statute of frauds.

SPECIFIC PERFORMANCE—NEED OF TENDER AFTER REFUSAL TO ACCEPT.

7. After a vendog has refused to accept further payments on a contract the vendee need not make any additional tender as a condition of enforcing specific performance of such contract.

SPECIFIC PERFORMANCE—EFFECT OF INCUMBRANCE.

8. Where, in a suit for specific performance, the complaint alleged that at the time of making the contract defendant was the owner in fee and in possession of the property, and the answer admitted such allegations,

and alleged that defendant had been and was the owner of the property which was incumbered by a real estate mortgage, a provision in the contract that the sale should be completed at complainant's option, as soon as title was perfected, did not preclude complainant from waving release of the mortgage and enforcing specific performance; defendant being entitled to a reasonable time thereafter in which to discharge the mortgage lien.

SPECIFIC PERFORMANCE—SUIT AS WAIVER OF INCUMBRANCE.

9. A vendee having a contract to purchase as soon as he may desire after the vendor's title shall be perfected may waive the preliminary requirement of title and demand a deed at any time, and the bringing of a suit for specific performance is such a waiver, though the title must be subsequently perfected within a reasonable time.

SPECIFIC PERFORMANCE—SCOPE OF RELIEF AFFORDED.

10. Where a vendor has leased property with an option to the lessee to purchase during the term, and then refuses to perform upon demand and retakes possession, the lessee is entitled to a decree restoring the possession, and directing the vendor to execute a deed upon payment of the contract price if the vendee so desires.

SPECIFIC DECREE—DAMAGES.

11. In a suit for specific performance, the court, having acquired jurisdiction, may assess such damages as appear to have been sustained prior to the filing of the complaint as incidental to the remedy of specific performance.

APPORTIONMENT OF COSTS.

12. Costs in equity cases may be apportioned to suit the particular case under consideration, as that the successful appellant be allowed only the costs and disbursements of the appeal.

From Umatilla: WILLIAM R. ELLIS, Judge.

Statement by MR. COMMISSIONER KING.

This is a suit in equity brought by Peter West against the Washington & Columbia River Railway Co. for the specific performance of a lease with an option to purchase lots 1, 7 and 8, of block 74, in Reservation Addition to Pendleton, Oregon. The complaint alleges that defendant is a corporation doing business in Oregon and Washington; that on or about March 15, 1900, plaintiff and defendant entered into an oral agreement, whereby plaintiff was given an option to buy the lots named for \$1,500 within 10 years from that date; that, together with the granting of such option, defendant agreed to lease the property to plaintiff for 10 years for \$100 per annum; that, as soon as convenient thereafter, a written lease, including the terms orally agreed upon, was to be executed; that at the time of entering

into the agreement constituting the terms of the lease and option plaintiff paid defendant \$100 thereon, and, with its consent, took possession and permanently improved the property at a cost of \$50; that he retained possession under the oral lease until January 19, 1902, on which date defendant wrongfully took possession of the property, removed the improvements, and commenced the construction of a depot thereon; that by reason thereof plaintiff is damaged in the sum of \$500; that he has done all things required of him under the contract, and has been, and is, ready and willing to pay the purchase price of the property. A decree is accordingly demanded to the effect that defendant be perpetually enjoined from erecting any buildings thereon or from otherwise interfering with plaintiff's possession; that it be compelled to convey the real property to plaintiff; and that plaintiff have judgment for \$500 damages, together with such other relief as may be deemed proper.

Defendant, by answer, admits its corporate capacity, and that it is the owner in fee of the premises, but denies all other allegations, and, as an affirmative defense, alleges that shortly prior to April 1, 1900, West entered into negotiations with defendant for a lease of the three lots referred to for a period of 10 years thereafter; that on April 1 of that year defendant submitted to plaintiff for his approval and signature a written lease executed in duplicate, being as follows:

"Articles of Agreement, entered into this 1st day of April, 1900, by and between the Washington & Columbia River Railway Company, a corporation, party of the first part, and Peter West of Pendleton, Oregon, party of the second part, Witnesseth:

That the Party of the First Part, in consideration of the agreements hereinafter contained, on the part of the party of the second part, hereby leases and lets unto the party of the second part, for the term of ten (10) years commencing from the date above written, the following described premises, situated at Pendleton Station, County of Umatilla, and State of Oregon, to-wit: All of lots one (1), seven (7) and eight (8) of block seventy-four (74). Reservation Addition to Pendleton.

Said Party of the Second Part, for and in consideration of the above leasing, agrees to pay to the party of the first part an annual rental of one hundred dollars, payable annually in ad-

vance for the first year, and every six months thereafter, and also to pay before the same shall become delinquent, all special taxes and assessments levied or assessed during the continuance of this lease upon the property hereby leased, and all regular and special taxes upon any buildings or improvements placed thereon by the party of the second part, and also, as a consideration of this lease, agrees that the Washington & Columbia River Railway Company shall not be held liable for any loss or damage by fire arising from the operation of said railroad caused by sparks from the locomotives, or otherwise.

And the Party of the Second Part also agrees to keep the premises above described clear and free from rubbish or other inflammable material which would tend to increase the risk of fire or give the grounds hereby leased or the grounds surrounding the same, an untidy appearance.

It is Further Understood and Agreed, that the party of the second part shall have no power to assign this lease or any interest therein, or sublet the whole or any part of the property leased to any person, persons or corporation, without first obtaining the written consent of the party of the first part.

It is Further Agreed that the party of the second party will surrender and vacate the premises immediately upon the termination of this lease and have the right to remove everything therefrom, whether the same be terminated by the expiration thereof, or by failure to comply with any of the provisions of this lease, reasonable time being allowed for removing everything therefrom.

A Failure by the Lessee to keep and perform any stipulation, condition or contract contained in this lease, to be kept or performed by such lessee, shall operate as a forfeiture of this lease and all the rights of the lessee herein except as to removing as aforesaid, everything therefrom, and the lessor may take immediate possession of said premises without any notice whatever, it being understood and agreed that said party of the second part shall have the privilege of buying the above leased lots as soon as title is perfected.

In Witness Whereof, the parties hereto have caused these presents to be properly signed and sealed the day and year hereinbefore written.

Washington & Columbia River Railway Co.,

In presence of
J. G. Cutler,
W. T. Dovell."

By J. P. McCabe,
Vice Pres. and Gen. Mgr.

It is also alleged by defendant that the written instrument referred to contains the whole of the contract and all terms agreed upon between them; that the written contract was not signed by plaintiff, but after receiving the duplicate copy, plaintiff, wrongfully and without authority, inserted therein after the word "lots" the words "for \$1,500," thereby making the last sentence of the written instrument read to the effect that plaintiff should have the privilege of buying the property for \$1,500. It is then averred that plaintiff returned the altered copy of the lease and retained the other copy; that defendant would not accede to the change made therein; that plaintiff went into possession of the lots wrongfully and unlawfully on or about April 1, 1900, inclosed the same with a fence at a cost of about \$25, and retained possession until October, 1901. Defendant then asks that the suit be dismissed, the temporary restraining order dissolved, and for such other further and general relief as may be deemed equitable. A reply was filed placing the case at issue. The cause was tried before the court, resulting in a decree dismissing the suit, from which plaintiff bring this appeal.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Robert Jay Slater*.

For respondent there was a brief over the name of *Carter & Raley*, with an oral argument by *Mr. Charles Harrison Carter*.

Opinion by MR. COMMISSIONER KING.

1. On March 14, 1900, Joseph McCabe, as agent for defendant, entered into an oral agreement with plaintiff, to the effect that West should have a lease on the premises for a period of 10 years at an agreed rental of \$100 per annum, the first year's rent to be paid on the date of the agreement, and \$50 semi-annually thereafter. Plaintiff was to have the privilege of purchasing the property at any time during the period of the lease, and it was understood that a written lease should thereafter be drawn containing the terms agreed upon. It was agreed that plaintiff should have the right to take immediate possession, and

accordingly paid \$100, constituting the first year's rent. With the knowledge and consent of defendant, plaintiff took possession of the property and inclosed the lots with a substantial fence. His possession continued until January 19, 1902, when he was ousted by defendant. On April 16, 1900, McCabe executed and forwarded to West what purported to be a written lease, being the instrument referred to in the answer, on receipt of which West, without affixing his signature thereto, placed it on record. Ten months later he returned the duplicate copy to McCabe, with his signature attached, with the words "for \$1,500" inserted after the word "lots," and preceding the clause "as soon as title is perfected"; and insisted that the understanding was to the effect that the inserted words were to be included in the lease when executed, which defendant disputed. On receipt of the duplicate copy defendant delivered it to its attorney, Chas. Carter, and wrote to West as follows:

"Walla Walla, Wash., March 14, 1901.

Peter West, Esq.,
Pendleton—

Dear Sir: Yours received. Before accepting any further rental from you for the ground, I desire that you see Mr. Carter and remove from the lease the addition which you made without our consent or authority. Unless this is done promptly, I shall cancel lease and return your remittance.

Yours truly,
J. P. McCabe,
G. M."

Plaintiff refused to strike out the inserted words, and insisted upon the lease, with option to purchase for \$1,500, being retained, and refused possession to the defendant. West tendered the company a draft for \$50 semiannually thereafter to be applied in payment of the rent agreed upon, all of which drafts were returned, except one, which it appears was returned to plaintiff during the trial.

The only question of fact bearing upon the issues upon which any conflict of testimony appears, and as to which there can be any doubt, is as to whether West was given the option to purchase for the price named. On this point plaintiff testified, in

substance, that on the afternoon of March 14, 1900, McCabe, as agent for defendant, agreed to let him have the lots at a yearly rental of \$100 for 10 years, with the privilege of purchasing for \$1,500, which agreement was made with him in the presence of Mrs. West; that the matter was discussed during the forenoon of that day, at the depot in Pendleton, in the presence of Walter Adams, the local agent of the company; that, the lots having previously been offered for sale, West had written to McCabe, offering to buy them, after which McCabe came to see him concerning them; that he told McCabe he would buy the lots, to which he replied that he asked \$1,500 for them, stating there was a mortgage on the property which he would have released, but would lease the land to him for the term of 10 years, with the privilege of purchasing for \$1,500, the rent to be \$100 per annum, payable in advance for the first year, and \$50 semi-annually thereafter, and that on receipt of \$1,500 defendant would execute a deed to him, and, on being asked how long he thought it would take to release the mortgage, McCabe stated it would be done within the year, but might be a little later; that they had more property for sale on that street, which they did not use, all of which could be released in one instrument; that West accepted the terms proposed, paid the \$100 for the first year, went into possession as agreed, and inclosed the same with a good and substantial fence at an expense of \$50. All of this testimony is corroborated by Paulina West, wife of plaintiff, whom it is conceded was present when the agreement was consummated and the money paid.

McCabe, in his testimony, admits all these statements, except as to the option to purchase at a fixed price, and states he did not agree to sell to West at any price, as he had no authority to sell, and could not do so because it was mortgaged; that the lots had been offered for sale for some time, having been placed in the hands of Jackson & Dickson Co.; that it was supposed that the property was in the hands of the trustee in fee simple, but discovered, after having negotiated and partially completed some sales, that the general mortgage had been given thereon

subsequent to the deed to the trustee, and that they did not know that fact when they first started to sell the property, but, as soon as this was learned, it was withdrawn from the market. It is admitted that West wanted to purchase, to which application McCabe says he answered:

"The only way we could let you have these lots is on a lease. I can make a long term lease on it for the term of 10 years, which is the limit of my authority as to time. I proposed making him a 10-years' lease to the property, and only (let him have) possession of it for \$100 per annum, which was agreeable, and he took it on these terms. I saw him later in the afternoon of this date at his home and had some talk with him about it, and it was understood that I should prepare the lease at my leisure."

Witness further adds:

"I never told West at his house that he could purchase the property at any price."

He explained the clause, "it being understood and agreed that the party of the second part shall have the privilege of buying the above listed lots as soon as title is perfected," as referring to the maturity of the mortgage or condition whereby it could be released by the mortgagee; that he did not tell West that he could have the mortgage released, but stated he had no reason to think that that could be done, but that he might have told him he would make an effort to do so, and thought they had some conversation along that line. Witness then states he had no authority to say what the property could be sold for, but that, as to the \$100, he turned it over to the company, which it has retained; that West sent him \$50 every six months, all of which was returned; that he notified West he had canceled the lease and afterwards placed Mr. Schultz in possession of the property as tenant, subsequently securing a release from him, and started to erect a depot on the lots when he was enjoined by plaintiff. It is shown they had some conversation as to the terms of the agreement in the presence of Adams, who testified to the same effect and corroborated McCabe's statements in reference to his refusal to sell. Adams' statements agree with

the testimony of West to the effect that plaintiff wanted to purchase from McCabe, and that McCabe answered to the effect that he would not sell, but would give him a lease for 10 years. This occurred in the forenoon, and during the latter part of the day McCabe went to plaintiff's residence, at which time and place, and in the presence of Mrs. West, the deal was closed and the first year's rent there paid. It will be observed that the only disputed point is concerning the sale and price to be paid. No dispute arose as to what was to be in the written lease, until the copy was returned to McCabe in the following November.

The testimony of Adams had reference only to statements made in the forenoon of the day on which the transaction had occurred and prior to its consummation. Various circumstances connected with the dealings between the parties tend to corroborate the testimony of plaintiff's witnesses. It is admitted that the property had been offered for sale and that West wanted to buy; that the matter was discussed by them, and that something was said by McCabe about getting the mortgage released, and that he caused the privilege of purchasing the lands to be included in the lease offered. It is not to be presumed that when the statement to the effect that West should have the privilege of purchasing was made and then inserted in the contract, no price had been mentioned between them. It would not be in harmony with the usual dealings between men to assume they would be so careless as to agree to sell and buy without any reference either to price or terms. Plaintiff retained the instrument for several months when he should have returned it, but this unfavorable circumstance is overcome by the statement in the lease to the effect that he could purchase the land if desired, as well as by the additional incident from which it appears that about the time he wrote plaintiff he would rescind the lease (10 months after the oral agreement) defendant had concluded to erect a depot on the property, evidently deeming the property to be of much more value than on March 14 of the preceding year, all of which may have furnished the motive for rescind-

ing the contract. It does not appear plausible that he would have taken the trouble to have written the provision in the lease regarding the sale if none had been intended.

We have the positive testimony of plaintiff as to the facts sustained, not only to a large extent by defendant's statements, but by the several events connected with the transaction. It is true plaintiff is an interested witness, but no less interested than the agents of defendant. Men holding positions such as general managers, local agents, etc., as a rule, are as much interested in retaining the good will and in elevating themselves in the estimation of their employers as are persons who may become interested in proceedings directly involving their own property rights. The difference lies in the nature of the expected results, not in the effect upon the testimony of the witness. Each wields the same influence, whether conscious or otherwise. While plaintiff was not entirely free from fault, which fault consisted in his neglect to return the written lease at as early a date as possible, his neglect in this respect presents a different aspect when it is remembered that the agreement was to be drawn and signed at their leisure. With that understanding, possession was given and the rent paid. No question was raised as to the lease being in full force, nor is sufficient reason either alleged or proven to establish defendant's right to cancel the lease at its will, yet, notwithstanding it admits facts showing a full compliance with the terms of the lease as such, defendant assumed the right to, and did, revoke it. We think the parol agreement to lease, with option to purchase for \$1,500, is clearly established by the evidence. The questions then left for us to consider are: (1) Had McCabe the authority to make the agreement to sell? (2) Can the oral lease and option be enforced in equity?

2. It is admitted by the pleadings that the defendant, at the time of the agreement, held title to the premises, subject only to the mortgages thereon; that McCabe at that time was its vice-president and general manager; that the written lease was executed by him in that capacity; that he received \$100 under the

parol agreement, and placed plaintiff in possession of the lots. He also admits that he was its general manager, and, as such, offered to dispose of its realty. No attempt having been made to show that he was acting outside of his duties as such manager, it will be presumed that he was acting within the scope of his agency in the dealings had with plaintiff. When McCabe testified that he was general manager, he thereby gave evidence that he was agent for the company in all its dealings. In effect he became, in his dealings with the public, the corporation itself. He and Adams testified they had no authority to contract for the sale of land, but this evidently was only their opinion, which probably results from the fact that McCabe knew the land was mortgaged; but the other facts in the testimony show conclusively, as a matter of law, that he did have such authority, and so assumed and acted at the time of making the parol lease. When asked if he had been looking after the sale of the property, he stated: "I had authority to dispose of it, and placed it with a real estate firm," although on cross-examination he stated that he had no authority except through the trustee. Whatever conclusion may be deduced from these statements, it is unquestionably shown that he was the general manager and vice-president of the company, and acted as such in the handling of this particular land along with its other property. These circumstances, taken together with the conceded fact that the money was paid to him, by him turned over to and retained by the company, are sufficient to manifest at least a ratification of his acts, and inevitably leads to the conclusion that he had full authority to bind defendant: *Kyle v. Rippey*, 20 Or. 446, 454 (26 Pac. 308); *Finnegan v. Pacific Vinegar Co.* 26 Or. 152 (37 Pac. 457); *Moore v. Crawford*, 130 U. S. 131 (9 Sup. Ct. 447; 32 L. Ed. 878); *Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 515 (16 Sup. Ct. 379; 40 L. Ed. 515); *Union Stockyard & T. Co. v. Mallory S. & Z. Co.* 157 Ill. 554 (41 N. E. 888; 43 Am. St. Rep. 341); *Atlantic & Pac. Ry. Co. v. Reisner*, 18 Kan. 458.

3. It is further urged that the minds of the parties never met, thereby rendering an agreement impossible. It is true both

parties did not execute the written instrument, but it clearly appears that everything was fully understood between them at their last meeting at West's residence on the afternoon of March 14, 1900, and that plaintiff immediately thereafter, with defendant's assent, entered upon the performance of his part of the contract. They are in the same position as if no writing had ever been drawn or tendered further than that such instrument was admissible in evidence as a circumstance tending to show an agreement to lease with option to purchase, as well as indicating the conceded portion of the parol contract. The parol agreement is shown to be certain and definite in its terms, and to be such as can be enforced.

4. We are not unmindful of the well-established and recognized rule that when the testimony is taken in the presence of the court, as in this case, great weight should be given the findings of the lower court on disputed questions of fact; but evidently the learned court below assumed the rule to be, as stated by some text-writers, as well as held by the courts in some states, that the contract must not only be shown to be clear and definite, but must be established beyond a reasonable doubt. This court has heretofore, and we think wisely, refused to accede to this doctrine. As stated in *Sprague v. Jessup*, 48 Or. 211 (83 Pac. 145: 4-L. R. A., N. S., 410): "The certainty of such a contract must be established by evidence sufficient to satisfy a court of equity of the truth of the allegations of the complaint"; but, "if the denial of a party against whom specific performance of an oral contract to convey real property is sought to be enforced is sufficient to defeat the right, it is quite probable that this equitable remedy would soon cease to be efficacious."

5. The proof leading to the conclusion reached in that suit was not so strong as in the case at bar, but it is there held that possession taken under the contract to purchase with part payment was sufficient to take the case out of the statute of frauds. In the case before us part payment and possession, as well as improvements made under the contract, are conceded, and we are fully convinced, after a careful examination of the testi-

mony, that the option to purchase was included in the parol contract. It is immaterial that defendant may have subsequently disclaimed a part of the terms agreed upon and refused to place them in writing, for the result must be determined, as in *Sprague v. Jessup*, not upon the rejected written instrument, but upon the previously consummated oral agreement.

6. It is contended that, this agreement being oral, specific performance cannot be enforced. This position overlooks the fact that possession was taken under the lease, permanent improvements made thereon, and one year's rent advanced and retained by the company. It is well settled in this state that part performance of a parol contract under such circumstances takes the case out of the statute of frauds: *Wallace v. Scoggins*, 18 Or. 502 (21 Pac. 558; 17 Am. St. Rep. 749); *House v. Jackson*, 24 Or. 89 (32 Pac. 1027); *McMahan v. Whelan*, 44 Or. 402 (75 Pac. 715); *Sprague v. Jessup*, 48 Or. 211 (4 L. R. A., N. S., 410; 83 Pac. 145); *Dechenbach v. Rima*, 45 Or. 500, 502 (77 Pac. 391, 78 Pac. 666). In *Wallace v. Scoggins* plaintiff brought suit for specific performance of a parol lease on certain alleged premises. It appears she had leased by oral agreement certain property for two years at an agreed rental of \$40 per month, entered into possession, paid the rent regularly, and fitted up the property at considerable expense. The court below held the lease to be valid for only one year, and that, as plaintiff had a remedy by action for unlawful detainer, dismissed the suit. On this point Mr. Justice STRAHAN, after mentioning the facts, said: "Do these acts, as part performance of this lease, on the part of both parties to it, entitle the plaintiff to have the same specifically enforced? I think they do. They are substantial on both sides, and go to the substance of the contract, and it would hardly be possible to restore the plaintiff to the condition she was in before the acts were performed. Relying upon the terms of the parol agreement, she incurred expenses and changed her circumstances and condition to such an extent that a refusal on the part of the defendant to perform operates as a fraud on the rights of the plaintiff. As I understand the

rule, this is such a part performance of the parol agreement as takes the case out of the operation of the statute of frauds." There can be no question that, to entitle a person to specific performance of a contract, there must have been at the time of entering into the agreement a mutuality both as to the obligation and the remedy; and the party not bound cannot enforce the contract. But, as stated by Mr. Justice MOORE, in *House v. Jackson*, 24 Or. 89 (32 Pac. 1027), "this general rule, like most others, has its apparent exceptions"; and, after quoting from *Waterman*, Spec. Perf. § 200, on this point, observed: "Such exception is less real than apparent; for, when the option is accepted, the minds of the parties have met and agreed upon the terms of the contract, and it thus becomes mutual, and is enforceable by either party." It was there held that under an agreement to lease, with an option to purchase, the contract to pay rent was sufficient consideration to support the option.

7. It is immaterial under the testimony as to the form in which the tender of rent may have been made, as defendant notified plaintiff that no payments of any kind would be accepted, thereby making a tender unnecessary as a condition precedent to his right to specific performance: *Guillaume v. K. S. D. Fruit Land Co.* 48 Or. 400 (86 Pac. 883).

8. It appears from the decision of the lower court contained in the transcript that one of the points upon which its conclusion is based is that, as the written lease contained the phrase "as soon as title is perfected" after the purchasing clause, this provision constitutes a condition attached to the privilege of purchasing, whether for the sum mentioned or at any price, and is "a limitation" which "the evidence does not show was ever removed." This overlooks the admissions in the pleadings, as well as the point that the defendant claims the title to be affected only to the extent of the lien created by the mortgage on the property. The complaint alleges that at the time of entering into the oral agreement "defendant was the owner in fee, and in possession," of the property. The answer not only admits this allegation to be true, but alleges that during all the

times referred to in the complaint "defendant has been and still is the owner of lots 1, 7 and 8, in block 74," etc., alleging that this property was covered by the real mortgage thereby described. The only way defendant attempts to show that the title is affected is by the mortgage lien. When used in this manner, the word "owner" has a definite meaning, and is one who has dominion over a thing, which he may use as he pleases, except as restrained by law or by agreement: *Johnson v. Crookshanks*, 21 Or. 339 (28 Pac. 78); *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202 (28 N. E. 555); *Bowen v. John*, 201 Ill. 293 (66 N. E. 357). Defendant then is restrained, if at all, only by the agreement contained in the mortgage. There is nothing to prevent it executing a deed subject to the mortgage on the property. The use of the words "as soon as title is perfected," when construed in the most favorable light to the defendant, indicates at least an agreement to permit plaintiff to purchase as soon as the mortgage is released.

9. Any provision made relative to the release of the mortgage was for the protection of the mortgagor, and therefore one which the lessee can waive. Having brought suit for the specific performance, defendant waives the incumbrance on the property until after the execution of the deed, and on the payment of the \$1,500 agreed upon is entitled to a conveyance, after which defendant is entitled to a reasonable time, not to exceed the period for which the lease and option was given, in which to procure a release of the mortgage thereon. It is well established that suits in equity may be maintained for specific performance, even where the vendor at the time of filing the complaint is incapable of giving a complete title to the property agreed to be sold. To hold otherwise would be to permit the vendor to take advantage of his wrong. Courts of equity, therefore, allow the purchaser to proceed with the purchase or abandon it, as may be desired: 26 Am. & Eng. Enc. Law (2 ed.), 83; Story, Equity, § 779; *Thompson v. Hawley*, 16 Or. 251 (19 Pac. 84); *Brown v. Ward*, 110 Iowa, 123 (81 N. W. 247); *Young v. Paul*, 10 N. J. Eq. 401 (64 Am. Dec. 456); *Graft v. Loucks*, 138 Pa. 460 (21 Atl. 203).

10. A parol agreement, clear and certain in its terms, having been satisfactorily established by the testimony, plaintiff is entitled to be reinstated and to be placed in possession of the property under his lease, with the option of purchasing for the price agreed upon. On tender of \$1,500, plaintiff is entitled to such deed as defendant can execute. As to whether plaintiff exercises his option or retains the property as lessee during the time prescribed in the contract is a matter entirely within his discretion.

11. A court of equity in the exercise of its discretion, where the payment of mortgages, or other liens, becomes necessary to perfect the title, may enter judgment for sufficient sum to cancel such lien, if any (*Thompson v. Hawley*, 16 Or. 251, 19 Pac. 84; *Waterman*, Spec. Perf. §§ 503, 505); but each case should be and is governed by its own circumstances: Section 504. In the case before us it is evident from the record that defendant can procure the release of the mortgage to the particular tracts involved at any time, if desired, and, its solvency not being questioned, we deem such judgment unnecessary. The question, therefore, of release of the mortgage liens upon the property, if any, remaining after execution of a conveyance to plaintiff, should, in this instance, be left for such determination as may be deemed proper in the event the option should be exercised.

A court of equity, after acquiring jurisdiction, as incidental to the remedy, may assess such damages as appear to have been sustained prior to the filing of the complaint: *Waterman*, Spec. Perf. § 5; *Fleischner v. Citizens' Invest Co.* 25 Or. 119, 131 (35 Pac. 174); *Bishop v. Baisley*, 28 Or. 119, 138 (41 Pac. 936); *Case v. Minot*, 158 Mass. 577 (33 N. E. 700); *Rugg v. Rohrbach*, 110 Ill. App. 532. Plaintiff insists that he has been damaged \$500, which amount he states could have been realized from the property up to the time of the trial, and for which sum judgment is asked. Defendant admits the rental value of the property to have been at least \$120 per annum, and is uncertain as to whether it was rented to Schultz for that amount or for \$130, while plaintiff testifies positively that the rental value was at least \$130. We think it safe to assume that plaintiff

has been injured to the extent of the difference between the rent agreed upon and the rental value, or \$30 per annum, from the date of being dispossessed to the time of filing the complaint. As to whether plaintiff has been damaged since the commencement of the suit cannot be determined under the issues here. It is shown that plaintiff has expended \$50 in improvements on the property, which, without reimbursement have been removed by defendant. After deducting the unpaid rent to date of filing the suit, we find plaintiff's damage, including loss of improvements, is approximately \$50. Plaintiff is entitled to a decree placing him in possession of the premises described in the complaint on payment of rent at \$100 per annum since date of suit, and to an injunction inhibiting defendant from interfering in any manner with his possession thereof during the period of his lease, with the privilege of purchasing and receiving a deed therefor from defendant at any time during the ten-year period upon tendering to it the sum of \$1,500, and is entitled to damages in the sum of \$50.

12. Plaintiff will be allowed his costs and disbursements on appeal.

The decree of the circuit court should be reversed, and one entered in conformity with this opinion. **REVERSED.**

Argued 7 May, decided 9 July, 1907.

MILLER'S WILL.

LUIS v. MUHRBACK.

90 Pac. 1002.

ESTABLISHMENT OF LOST WILLS—BURDEN OF PROOF.

1. Where a will is shown to be lost, secondary evidence is admissible to show its contents, the burden being upon the proponent to clearly establish its execution.

LOST WILL—PRESUMPTION OF REVOCATION FROM POSSESSION BY TESTATOR.

2. If, when last seen, a will was in the possession of the testatrix, and cannot be found, it will be presumed, in the absence of other evidence, that she destroyed it.

SAME—PRESUMPTION AS TO REVOCATION FROM POSSESSION BY STRANGER.

3. In a proceeding for the probate of a lost will, where the possession of the will is shown to have been intrusted to a third person, the burden of retracing it into the hands of the testatrix is upon the contestant.

WEIGHT AND SUFFICIENCY OF UNCONTROVERTED EVIDENCE.

4. Where a disinterested witness, who is in no way discredited by other evidence, testifies to a fact within his knowledge, which is not in itself improbable, or in conflict with other evidence, the facts so given will be taken as legally established.

COMPETENCY OF INTERESTED PERSON.

5. The testimony of witnesses is not to be disregarded merely because they are interested in the result.

WILLS—PROBATE—EVIDENCE—BURDEN OF PROOF.

6. Where, in a proceeding to probate a lost will, it is shown that the will was duly executed, the presumption of law is strong in its favor, and its revocation must be clearly proven.

LOST WILL—COMPETENCY OF DECLARATIONS OF TESTATRIX CONCERNING SUCH WILL AND HER FEELINGS TOWARD DEVISEES.

7. In a proceeding to probate a lost will, declarations made by the decedent subsequent to the execution of the will, and within a reasonable time prior to her death, showing it to have been deposited with a third person, and that it was still there to within a few days of her death, and declarations showing her affection for the devisees, with no change in her feelings toward them, when corroborated by direct evidence that after making the declarations she had no opportunity of withdrawing the will, are admissible as a basis for an inference that the will had not been returned to her possession or canceled.

From Union. ROBERT EAKIN, Judge.

Statement by MR. COMMISSIONER KING.

This was a proceeding in the County Court of Union County, Oregon, for the purpose of proving an alleged lost will of Ferena Miller, who died in that county November 19, 1900. The petition for probate was filed by Edward Luis July 13, 1903, alleging that Ferena Miller died on the date and in the county mentioned, leaving a large estate therein, consisting of both real and personal property, with no lineal descendants surviving her; that the petitioner and his sister, Clara Luis, had made their home with decedent from their infancy, with the understanding that they should inherit all of the Miller property; that a will was executed bequeathing to the petitioner all of the personal property, together with the 40 acres of land upon which the dwelling and all other buildings were situated, and to him and his sister, Clara, share and share alike, all the remaining real property; that the land bequeathed to him is the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 29, with appurtenances, and the property devised to them jointly consists of the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of

section 19, W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 20, N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 29, all in township 5 S., range 39 E., W. M., in Union County, Oregon; that immediately after its execution the will referred to was deposited and left for safe keeping either with N. Tartar, since deceased, or with the First National Bank of Union, Oregon, but has been lost, and after diligent search cannot be found. Evidence was offered in support of the petition, resulting in an order being made by the county court to the effect that the will be admitted to probate.

On July 7, 1904, Jacob Muhrback, as contestant, filed a petition with the county court, praying that Luis be cited to appear and show cause why the order entered sustaining his petition should not be vacated, alleging that Ferena Miller died intestate, leaving no one capable of inheriting her estate, except contestant; that contestant is a brother of decedent, and that all her property descended to, and is inherited by, him under the laws of Oregon; that he is informed and believes that Luis, under an alleged will, claims to have succeeded to all the property of which she died seised, but, if such will was executed, it was revoked. Luis answered, admitting the residence and death of the decedent, and that she left no lineal descendants, but denied the other allegations. The cause, being at issue, was referred to H. R. Hanna as special referee for the purpose of taking the testimony therein, which was thereafter taken and reported to the court, after which (August 13, 1906) the county court set aside its former order, from which action an appeal was taken by proponent. The circuit court, on appeal, reversed the decree of the county court, sustained the allegations of the petition for probate, and decreed the legatees to be the owners, under the will, of the property alleged to have been bequeathed to each, as above described. From this decree, Muhrback appeals.

AFFIRMED.

For appellant there was a brief over the name of *Cochran & Cochran*, with an oral argument by *Mr. Charles Edgar Cochran*.

For respondents there was a brief with an oral argument by *Mr. Lewis Jay Davis*.

Opinion by MR. COMMISSIONER KING.

The evidence discloses that in the year 1864 Adam Miller, with his wife, Ferena Miller, settled upon what is known as Catherine Creek, in Union County, in this state, later removing to Clover Creek in that vicinity, where they afterwards continuously resided. Adam Miller died June 26, 1886, but his wife lived until November 19, 1900. Prior to the death of Adam Miller, being without children, they took into their home Edward Luis and his sister, Clara, the oldest of whom was about nine years of age, the boy being a nephew and the girl a niece of Mrs. Miller. Some time prior to 1886 an effort was made to adopt Edward, resulting in a failure on account of an irregularity in the proceedings, which oversight was not discovered until steps were taken to administer upon Adam Miller's estate. The children, however, continued their home with Mrs. Miller until of age, after which Clara married one Geo. A. Aughey, but Edward remained on the farm, devoting his full time and labor in its improvement. At all times after being taken into the Miller home, both he and his sister were treated as members of the family, and were recognized by the people in that vicinity as such. On the death of her husband Ferena Miller succeeded to all his estate. A few years afterwards she executed a will, in which Edward and Clara Luis were made her beneficiaries to share equally in all her property. A few years later, and after Clara married, this will was destroyed and revoked. After considerable delay she made a new will, being the one involved here. This will was executed in the office of C. H. Marsh, an attorney in Union, and witnessed by him and one Mrs. A. M. Tartar, who resided there. Before being signed, it was read in the presence of the witnesses to Mrs. Miller, who, after hearing it read, stated that the will was as she wanted it, and that it was her last will and testament. Marsh then inclosed the will in an envelope and delivered it to the testatrix, who, in company with Mrs. Tartar, went to the First National Bank of that place, and handed the envelope with will inclosed to "Will Wright," the cashier, who, after having her indorse instructions thereon, retained it for safe-keeping.

1. Under our Code (B. & C. Comp. § 791) a will must be in writing, except when made by a soldier or mariner in active service, but, when in writing, secondary evidence is admissible to show its contents. Like any other written instrument, when shown to have been lost, it may be established on proof of such loss, the burden of which is on the proponent, and its execution must be clearly established, but, when this is done, it may be admitted to probate unless shown to have been revoked: 16 Enc. Pl. & Pr. 1065; 23 Am. & Eng. Enc. Law (2 ed.), 147; *Wallis v. Wallis*, 114 Mass. 510; *Harris v. Harris*, 26 N. Y. 433. Contestant insists that the will was destroyed and accordingly revoked by the testatrix, but this charge proponent denies, asserting that it was never withdrawn from the bank. On this issue the result of this suit depends.

2. If, when last seen, the will is shown to have been in the possession of the testatrix, and cannot be found, it must be presumed, in the absence of other evidence, that she destroyed it: 23 Am. & Eng. Enc. Law (2 ed.), 148; *Collyer v. Collyer*, 110 N. Y. 481 (18 N. E. 110: 6 Am. St. Rep. 405); *Behrens v. Behrens*, 47 Ohio St. 323 (25 N. E. 209: 21 Am. St. Rep. 820).

3. But, under our view of the evidence, the possession of the will is shown to have been intrusted to a third person, the bank, as a depository. The burden, therefore, of retracing it into the hands of the testatrix is upon the contestant. Especially is this true when shown that within a short time before her death declarations were made by decedent to the effect that the will was still in existence and in the bank, after which she could not have had access to it: *Thornton, Lost Wills*, § 62; *Schultz v. Schultz*, 35 N. Y. 653 (91 Am. Dec. 88); *Dawson v. Smith*, 3 Houst. (Del.) 335; *In re Harris' Estate*, 10 Wash. 555 (39 Pac. 148).

It is conceded that the will, after being properly executed, was taken from the attorney's office by Mrs. Miller in company with Mrs. Tartar. As to what was afterwards done with it there is some controversy. Mrs. Tartar, a disinterested witness, testifies that, as soon as the will was executed, it was taken to the First National Bank of Union, Oregon, and there delivered to

"Will Wright," cashier; that she was present, heard the conversation between them, and saw the envelope with will inclosed turned over to him; that no other persons were present at the time; that she and Mrs. Miller were very intimate friends; that Mrs. Miller was at that time visiting with her in Union; that decedent had previously made a will, appointing "Mr. Dobbs" administrator, but claimed to be dissatisfied with it, and said that there was some little disturbance when she made it; that she saw her destroy this first will by throwing it into the stove, saying at the time: "'Some of these days when the weather is good you go with me and I will make a new one,' which I (Mrs. Tartar) concluded to do"; and that the will here in question was thereafter executed and left in the bank as stated.

It is insisted that this testimony is inconsistent with one of the statements of the witness on cross-examination, when, in answer to an inquiry as to whether she knew what became of the last will, she stated:

"A. I could not tell you that. She took it home to Clover Creek, 16 miles from here, and took sick and had her hip out of joint, and I never was up there since.

Q. Was she ever back to your residence at any time after this will was put in the bank?

A. Oh, yes, yes. She was here once and I can't tell. I thought she was out of humor, and she had a little valise with her, where she generally carried papers, and she didn't talk to me anything about it. I don't know what she had in the valise. She went to town. She was mad over something. Clara was here and Ed was here, and she went to town. She was in the house with me awhile and then took the valise and went off, and I always believed in my own mind she took the will out of the bank, because she said Ed and Clara told her to take that will out of the bank—"that somebody might get it and cause you a great deal of trouble and get everything you have got." 'Well,' I says, 'a person wouldn't have common sense that would speculate on anything like that.' She went off after she expressed herself that way, and she come back with the valise in her hand, and never let go of it any more. She seemed to act troubled."

In this connection it will be observed that, while Mrs. Tartar was quite an intelligent witness, she was at the time of giving

her testimony 77 years old, and accordingly easily confused. Assuming the statement of the witness, as claimed, and as it first appears, indicates that the testatrix withdrew the will from the bank, it is evident that she only intended it as her opinion, for nowhere does it appear that she claims to have any direct knowledge to that effect, and it is manifest that she derives this opinion only from the circumstances there stated. The witness was evidently trying to evolve a theory by which she could account for the missing will. She was so firmly impressed with the idea that it was at the bank that she had called there for it, and insisted upon a thorough search being made at that place, to which request the bank officials responded without hesitation, but unsuccessfully. A search had been made by other banks and at various other places wherever deemed possible that it might be found, all without avail. She had seen the first will destroyed, witnessed the new one, and saw it deposited for safe-keeping, and, all efforts in trying to solve the mystery of its disappearance having failed, she recalled the incident in Mrs. Miller's visit at her residence of a few years before, when she abruptly left the house, carrying a satchel, and soon returned, appearing worried, and as a result, on the impulse of the moment, concluded and gave it as her opinion or theory that Mrs. Miller had procured the will and taken it with her to Clover Creek. Unless this opinion expressed under these circumstances can have sufficient weight to demonstrate otherwise, it must be held that thus far it is shown that the will, when last seen, was in the possession of a third person, the bank, and that contestant has not overcome the presumption recognized by our statute (B. & C. Comp. § 788) to the effect that a condition once shown to exist continues until the contrary is proved, or until such presumption is overcome by other proof. The retracing of the will into the possession of the testatrix is not established by the opinion of this witness, as expressed, unless sustained by other circumstances and by evidence corroborating that theory.

Will Wright testifies that he does not remember the will having been deposited with him; but does remember the first

will having been taken out of his bank by Mrs. Miller. Testimony by a witness to the effect that he does not remember a certain event, notwithstanding his opinion that he thinks if it had happened he would recall it, is not entitled to great weight as a rule. For example, if A., while passing through a large crowd, observes B., speaks to him of matters in which he has a special interest, and long afterwards A. should be asked if he saw B. on that certain date, the answer would, without hesitation, most likely be in the affirmative. The testimony of A. on that point would be entitled under the circumstances to much greater weight than would that of B., who conversed not only with A., but with numerous others, and who may not happen to remember seeing A. nor recall the conversation. The reason for this is obvious. The matter discussed, while of special interest to A., was of no direct interest to B. A. was specially concerned in the topic there discussed, and directed his attention only to the one person, while B. was equally as much concerned, and conversed with numerous others, thereby forgetting A., who may distinctly remember him. Before us we have the testimony of the cashier of the bank saying that he has no recollection of this particular transaction. By virtue of his business, he was presumably from day to day considering many transactions in the line of his work with people of all classes and localities. Papers of various kinds were being deposited in, as well as withdrawn from, his bank, with no special reason for charging his memory with any particular one of them. When the will was left there a memorandum of Mrs. Miller's wishes was indorsed thereon, leaving no special duty on his part to be remembered. Eight years then elapsed, during which doubtless innumerable documents by different persons were left with him for safe-keeping. It is therefore not surprising that he does not recall this particular transaction. Failure to remember incidents of that kind under such circumstances are not unusual; but failure to have remembered the event on the part of Mrs. Tartar would have been an exception to the general rule. She had only her affairs, with occasionally that of some friend, as in this instance, with

which to charge her memory. Mrs. Miller looked to her as her particular assistant and friend on this occasion. She always visited and stayed with her when in Union, and had spent the winter at her home, and had frequently discussed the "will question" with her. She had seen the first will destroyed and witnessed the execution of the second, which she swears positively to having seen deposited in the First National Bank. The person who clearly remembers an event can feel morally certain of its occurrence, while the one who only fails to recall the incident cannot feel assured of its nonoccurrence. The one who sees, and remembers, knows, but the person who can only say, "I do not remember," does not know. He can only form an opinion, and say "I think" the incident did not transpire, etc., the strength of which opinion would depend, not alone on the circumstances surrounding the transaction, but, too often, upon the confidence the witness may have in his ability to remember all the dealings in which he may have taken part. It being satisfactorily established that the will was deposited in the bank, and the burden of proving its return to the possession of the testatrix being upon the contestant, it results that Mrs. Tartar's opinion on this point, that "she took the will to Clover Creek," although lightly supported by the circumstance of the failure to find the will, is insufficient, without other evidence, to establish the claim that she came into its possession after its deposit for safe-keeping, especially when considered in the light of all the circumstances shown by the record further discussed herein.

The testimony of Mrs. Tartar is harmonious on the point discussed, when taken in connection with her statements in reference thereto of three years previous in a former suit between Luis and Muhrback, involving the same property, the record of which has been introduced in evidence herein. The lapse of time between the trial of the two cases must be taken into consideration as to the memory of one of her age. When her evidence was taken in the first suit (June 19, 1903), it was much closer to the happening of the events concerning which she testified, and her statements were presumably more likely to be

accurate. However, the only material difference to be found in the entire testimony of the two cases is on this point. In the first suit, when questioned on this particular point, the witness said:

"A. I never saw Mrs. Miller from that time any more. The last time she was in our house. From the last time she was in our house she signed some papers in our house—mortgages in our house—she said she wished she had the money back on these papers. I said 'they are mortgages, and you can't get the money back until the mortgages are satisfied.'

Q. Did she say anything about the will at that time?

A. She did not. She said she didn't know what she was signing, and she was crying, and such talk as that.

Q. She was talking about the will then?

A. She didn't talk about the will, and took her valise and went up town and was gone away an hour, and when she come back she didn't talk about the will, but she watched the valise very close. She never talked about the will, but I always supposed she took it home and burned it.

Q. So the last time she was down at your house she took her valise and went up town, and when she come back she guarded that valise very carefully?

A. Very closely. Never let it out of her hand while she was in the house, and took it away with her.

Q. And it is your opinion she destroyed that also?

A. That is my opinion.

Q. At the last time she was in your house in this talk with you she regretted ever having made this will, did she?

A. No, sir; I can't, I don't know, that she said anything of that kind. She didn't mention the will. I supposed in my own mind.

(By Mr. Crawford: Your supposition is not testimony.)

A. I know it, Mr. Crawford. She didn't say anything in regard to the will.

Q. And after having that conversation with her is when she went up town under those circumstances?

A. After she and I were talking together and she said she wished she could get her money back, what she signed for before, after we had that talk, she took her valise off the table and went to town, and she was gone some time, and come back, and never let that valise out of her hand again.

Q. And that is the last time you ever saw her? ,

A. Yes; the last time I ever saw Mrs. Miller."

In the suit under consideration it is obvious from these statements that the "trouble and dissatisfaction" referred to in her testimony arose over some mortgages she had signed in some manner, and not over the will. When asked three years later concerning this incident, with her memory probably confused for the instant, it may have occurred to the witness that the document concerning which the decedent was worrying when "crying" and "wishing she had her money back" was the will drawn, notwithstanding the will was never mentioned on that occasion. While the witness had always been a warm friend of the Miller family, at all times manifesting the kindest feeling and interest in them, and while her testimony supports proponent's contention, it is manifest in both suits that she endeavored at all times to tell the facts as she remembered them.

3. It is firmly established everywhere that, as a general rule, when a disinterested witness, who is in no way discredited by other evidence, testifies to a fact within the knowledge of such witness, which is not in itself improbable, or in conflict with other evidence, the witness is to be believed, and the facts so given are to be taken as legally established: *Kavanaugh v. Wilson*, 70 N. Y. 177; *Evans v. George*, 80 Ill. 51; *In re John Immel's Estate*, 59 Wis. 249 (18 N. W. 182).

The testimony of Mrs. Tartar is corroborated by that of proponent and Mrs. Aughey, each of whom testify to having made their home with the testatrix since they were very young; that both Mrs. Miller and her husband had always manifested the same interest in them as if they were their own children, and always promised that their property should all descend to them at their death; that they had many times heard her explain that she had made another will after destroying the first, giving its contents, and that up to within four or five days of her death she had stated that the last will had been left with the First National Bank, and was still there, and that after she made her last statements to that effect she had no opportunity to come into

possession of the will. The interest manifested in the children by the testatrix and her husband up to the time of the death of each, as well as many of the circumstances tending to show their intention regarding their property, is also testified to by the witnesses to the first will. In considering the weight to be given to the testimony of Mrs. Tartar, we must take into account, so far as can be ascertained, not only her opportunity to know the facts, as well as reasons for remembering them, but incidents connected with the lives of the parties concerning whom she has testified, their habits, customs, affection towards the parties interested herein, relationship and experiences to the time of their death. In that connection the parental interest manifested is unquestioned; and, in fact, it was believed by all that the proponent was adopted by them, which impression continued until some time after the death of Adam Miller, when, in administering upon the estate, it was learned for the first time that the adoption proceedings were irregular and void. Knowing it was intended that they should inherit the property, both remained with them, and proponent devoted many years of his life and all his labor to the upbuilding of the farm, with the expectation that their promises would be fulfilled.

After learning that the attempted adoption of Edward was void, thereby precluding him from being her heir, Mrs. Miller executed a will by which she made Edward Luis and his sister, Clara, the beneficiaries, to share equally in all her property. Later we find that the sister married, soon after which the testatrix decided to destroy the will and execute a new one, by which she would reduce the interest to go to Clara and increase that to be devised to her brother. This may have been on account of being displeased with her marriage, but probably for the reason that Clara, by her marriage, was provided with a home, thereby needing less assistance, as well as for the further reason that her brother was to remain on her farm, thereby earning the greater interest. The new will was drawn accordingly, bequeathing to Edward the home place of 40 acres, with all personal property and improvements, and the residue of the realty,

consisting of about 300 acres, going to him and his sister equally. The whole course and conduct of the testatrix, not only manifested a determination that the property at her death should go to them, but there is nothing in the entire record tending to show that after the second will was deposited at the bank she ever changed her mind or plans in any manner, or that the amicable relations between them underwent any modification, thereby tending to overcome the showing made by failure to find the will where deposited: *Spencer's Appeal*, 77 Conn. 638. Nor does it appear that decedent ever had any special interest in the contestant. Although a brother, he had lived in Ohio, and, as far as appears, was unheard of in Oregon until after her death. All these salient features point to the correctness of the statements of Mrs. Tartar on the subjects involved, as well as the truthfulness of the testimony of proponent and of Mrs. Aughey, who, although interested witnesses, are entitled to belief. In fact, there is nothing to discredit their testimony, except so far as their interest may be considered.

5. Some apparent inconsistencies appear in proponent's statements in the two suits, but, when his testimony in the two proceedings are considered as a whole, it is very evident that he intended to state only the facts as he remembered and understood them. The testimony of witnesses is not to be disregarded merely because they are interested in the result. Other reasons for discrediting them must appear. As stated by Mr. Justice GRAY, in *Hull v. Littauer*, 162 N. Y. 572 (57 N. E. 102): "Generally the credibility of a witness who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances, if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences

from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness." See, also, *Second Nat. Bank v. Weston*, 172' N. Y. 250 (64 N. E. 949); *Daniels v. Foster*, 26 Wis. 686.

6. Again, when once shown that the will was duly and regularly executed, the presumption of law is strong in its favor, and its revocation must be clearly proven: *Johnston v. Johnston*, 1 Phillimore Rep. 447, cited with approval in *Throckmorton v. Holt*, 180 U. S. 584 (21 Sup. Ct. 474: 45 L. Ed. 663). The will has been traced to the bank, the officials of which have no recollection of either its receipt or withdrawal. During her lifetime no one had authority to withdraw it but the testatrix. After diligent search it could not be found. In the absence of evidence to the contrary, it might be inferred from the failure to find the instrument where deposited that it had been withdrawn by the party executing it, which fact, when once deduced, would raise a *prima facie* presumption that it was revoked. Notwithstanding the deduction possible to be made from the showing that the will could not be found, the evidence, direct and circumstantial, when considered as a whole, is ample to overcome any inference possible to be drawn therefrom.

7. There being no presumption arising from this showing alone, but merely the possibility of an inference, the facts from which, when once inferred, might raise a presumption, and the onus being on those who assert the revocation, the question arises: Can the declarations made by decedent subsequent to the execution of her last will, not only showing it to have been deposited, as claimed, but that it was still there to within a few days of her death, and declarations tending to show her affection toward the devisees, with no change in her feelings toward them, thereby indicating the improbability of desiring to revoke the instrument, when corroborated by direct evidence that after the making of the declarations she had no opportunity to withdraw the will from the bank, or otherwise come into possession of it, be admitted for the purpose of having the court infer that the

will had not been returned to her possession nor revoked? The authorities on this subject are far from being uniform. Among those holding declarations of this kind inadmissible are *Leslie v. McMurtry*, 60 Ark. 301 (30 S. W. 33); *Walton v. Kendrick*, 122 Mo. 504 (27 S. W. 872: 25 L. R. A. 701); *In re Burbank*, 104 App. Div. 312 (93 N. Y. Supp. 866); *In re Kennedy's Will*, 167 N. Y. 163 (60 N. E. 442); *Gordon's Case*, 50 N. J. Eq. 397 (26 Atl. 268). This question does not appear ever to have been directly before this court, but in the case of *Young v. State*, 36 Or. 417 (59 Pac. 812: 47 L. R. A. 548), it is held that declarations of a decedent are admissible to identify the deceased by showing his conversation upon the subject and the account he gave of himself during his lifetime. The same reasons which would admit declarations for the purpose of identifying the decedent, thereby enabling an heir to succeed to property, should make declarations admissible for the purpose of showing the existence of a will and that it had not been destroyed or revoked. The continuing validity of a will always depends upon the intention of the testator that the instrument purporting to be his last will and testament shall be and continue to be such. Then, why should not only his acts, but his declarations as well, be admissible, both as to the disposition of the property and the intention existing within any reasonable time before death, and after the execution of the will, as well as before? The early English cases held declarations made after the execution of the will inadmissible: *Wharram v. Wharram*, 3 S. W. & T. R. 301: 32 L. J. (P. M. & A.) 75; *Quick v. Quick*, 3 S. W. & T. R. 442: 33 L. J. (P. M. & A.) 146. But in 1876 these decisions were overruled in what is recognized as a leading case: *Sugden v. St. Leonards*, L. R. 1 P. D. 154. In this case, as in many decisions on the subject in this country, a dissenting opinion appears. In giving his reasons therefor, MELLISH, L. J., said: "I am not myself prepared to say that the decision in *Quick v. Quick* is bad law. If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement

in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. But the difficulty I feel is this: That I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all question, as the law now stands, we are not as a general rule entitled to receive."

It is also suggested in some opinions in support of that view that there is no more reason for admitting evidence of this nature in reference to wills than in the case of deeds; but this position overlooks the distinction between a will and a deed, and the difference between the results which might often follow, if received in both instances, or rejected in both, as the case may be. By the execution of a deed title passes to the grantee; but in the making of a will nothing passes at the time, the status of the property remains unchanged, its execution in no way encumbers the title; it may be conveyed or mortgaged as before, and to the time of the death of its owner the property remains subject to any disposition desired. Any declarations, therefore, which the testator may make after the date of the will cannot affect vested rights; but with a deed, when executed, the title has departed, and to admit the grantor's declarations after its delivery might impair, not the grantor's rights, but the vested rights of an innocent purchaser. In one case the declarations would impair vested rights, while in the other it would only affect the rights of those claiming an inheritance through the person making the declarations. The declarations after the will would follow the title and affect the interests of persons claiming title by reason of his death, but in no sense could they be affected as innocent purchasers for value. Nor can they have any rights in or to the property at all, if the deviser sees proper to declare otherwise, and if, by making a will, he can change the beneficiaries

at any time from his legal heirs to persons who would not otherwise inherit his estate, it is but reasonable and just that any declarations made within a reasonable time prior to his death, in reference to his wishes and intention, should be permitted to follow, and be admissible for the purpose of determining whether such will had in fact been executed; whether revoked, if made; and, if accompanied by any corroborating circumstances, to determine its contents, if lost. It is true that as a general rule the declarations of a deceased person, whether in writing or oral, are inadmissible. "But," says MELLISH, L. J., in *Sugden v. St. Leonards*: "So inconvenient was the law upon this subject, so frequently has it shut out the only available evidence, so frequently would it have caused a most crying and intolerable injustice that a large number of exceptions have been made to the general rule." In discussing the same point in that case, COCKBURN, C. J., observes: "The declarations of deceased persons are in several instances admitted as exceptions to the general rule—where such persons have had peculiar means of knowledge, and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case."

In *Burge v. Hamilton*, 72 Ga. 625, the court, speaking through Mr. Chief Justice JACKSON, said: "And after reviewing other English and many American decisions of eminent judges in this country, our own first Chief Justice thus announces the con-

clusions of his own mind: 'Having thus, as briefly as I could, adverted to the conflicting decisions upon this vexed question, James Kent and Joseph Story, men unsurpassed for legal learning, being arrayed against Ambrose Spencer and Thomas Ruffin, to say nothing of Spencer Roane, than whom abler common-law judges never presided in the courts of this country, and differing as I do from a worthy brother and associate, for whom and for whose opinions I have the highest respect, I must say that I have not a scintilla of doubt resting in my mind that the testimony excluded should have been received by the circuit court.'” An examination of most of the cases holding declarations of this class inadmissible discloses that the conclusions there reached are largely due, whether consciously or not, to the fear that such declarations, even when conclusively shown to have been made, are unreliable. This fear is not without some foundation. But while the statements of a declarant may sometimes be false, and intentionally so, or when true may have been misunderstood, or may be inaccurately remembered, or misquoted from design, this can go only to the degree of credit to be given the testimony and not to its admissibility. Because evidence should be weighed with care is not sufficient alone to justify its exclusion. The possible evils which might result from the exclusion of this class of testimony are far more to be feared than are those which might accrue from the possibility of declarations admitted being untrue, misquoted, or otherwise inaccurately given: *Collagan v. Burns*, 57 Me. 449.

After a careful consideration of the subject, we are of the opinion that the great weight of authorities from the time of the decision in the *Sugden-St. Leonards Case* down to the present, as well as the better reasoning, sustain the admission of the declarations of a decedent made after the execution of a will as well as before, if made within a reasonable time prior to his death, and warrant us in holding such declarations admissible under the circumstances in the case before us. Among authorities supporting the rule here recognized are Thornton, *Lost Wills*, § 64; 23 Am. & Eng. Enc. Law (2 ed.), 149; *Sugden v.*

St. Leonards, L. R. 1 P. D. 154; *In re Spencer's Appeal*, 77 Conn. 638 (60 Atl. 289); *Ewing v. McIntyre*, 141 Mich. 506 (104 N. W. 787); *McDonald v. McDonald*, 142 Ind. 55 (41 N. E. 336); *In re Page's Will*, 118 Ill. 576 (8 N. E. 852: 59 Am. Rep. 395); *In re Marsh's Will*, 45 Hun, 107; *Gavitt v. Moulton*, 119 Wis. 35 (96 N. W. 395); *In re Donnelly's Estate*, 190 Pa. 417 (42 Atl. 882: 70 Am. St. Rep. 637); *Clark v. Turner*, 50 Neb. 290 (69 N. W. 843: 38 L. R. A. 433); *Williams v. Miles*, 68 Neb. 463 (94 N. W. 705, 96 N. W. 151: 62 L. R. A. 383: 110 Am. St. Rep. 431); *In re Harris' Estate*, 10 Wash. 555 (39 Pac. 148); *Pickens v. Davis*, 134 Mass. 252 (45 Am. Rep. 322); *Lane v. Moore*, 151 Mass. 87 (23 N. E. 828: 21 Am. St. Rep. 430); *Davis v. Elliott*, 55 N. J. Eq. 473 (36 Atl. 1092); *Hoppe v. Byers*, 60 Md. 381; *Burge v. Hamilton*, 72 Ga. 568.

The declarations of the testatrix having been properly admitted, they, together with the circumstances shown in connection therewith, so fully sustain the direct and positive testimony before us that we are satisfied the second will made was regularly executed and never revoked. The conclusion reached by the circuit court being in full accord with the facts as they appear from the record, the decree of the circuit court should be affirmed.

AFFIRMED.

Mr. Justice EAKIN, having tried the cause in the court below, did not sit in this case.

Decided 25 June, 1907.

JACOBSON v. LASSAS.

90 Pac. 904.

MORTGAGES—REDEMPTION—EFFECT.

A senior mortgagee in a suit to foreclose his mortgage joined a junior mortgagee as a defendant, and the decree in terms foreclosed all title and estate of the defendants. The property was sold under the decree, and the junior mortgagee purchased, and the senior mortgagee, having succeeded to the interest of the mortgagor, redeemed from the sale. *Held*, that the redemption by the first mortgagee abrogated the sale of the premises, and restored to him, as the successor in interest of the mortgagor, the estate in the land as if the first mortgage had not been given, and the land was subject to the lien of the second mortgage.

From Baker: WILLIAM SMITH, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by Oscar Jacobson against George Lassas to quiet the title to certain real property in Baker County; the complaint being in the usual form. The answer states the nature and extent of the defendant's claim to the land, as hereinafter alleged. The reply avers, in effect, that on December 24, 1890, the premises were conveyed, subject to a mortgage of \$3,500, to one Lettie McCarty, who, November 21, 1900, further mortgaged the land to secure the payment of \$1,500; that the latter mortgage was assigned to the defendant, who, January 14, 1902, commenced a suit to foreclose the lien, but the suit was dismissed September 30, 1904, and he appealed to the supreme court, which reversed the decision January 30, 1906, and entered a decree granting the relief sought (*Lassas v. McCarty*, 47 Or. 474: 84 Pac. 76), and pursuant thereto the real property was sold to the defendant for \$2,373.90, and the sale was confirmed September 24, 1906; and that such proceedings constitute the only interest he has in the land. It is further averred in the reply that the prior mortgage was assigned June 4, 1904, to the plaintiff, who, 21 days thereafter, secured from Lettie McCarty a conveyance of the premises in fee, and September 16, 1904, he also commenced a suit to foreclose the superior lien, making Lassas a party defendant with others, and alleging in the complaint that they claimed a lien on the real property which was inferior to his rights therein; that Lassas was served with a summons in that suit, and such proceedings were had therein that a decree was rendered March 17, 1905, foreclosing the first mortgage and declaring that each of the defendants was barred of all right, title, interest and estate in and to the premises, except the statutory right of redemption, and that, no appeal having been taken, the decree has become final; that pursuant thereto the land was duly sold to Lassas April 28, 1905, and eight days thereafter the plaintiff herein, as the successor in interest of Lettie McCarty, redeemed the real property from such sale. A demurrer to the reply was sustained, and, the plaintiff declining further to plead, the suit was dismissed, and he appeals.

AFFIRMED.

For appellant there was a brief with an oral argument by *Mr. Charles Allen Moore*.

For respondent there was a brief over the names of *Samuel White* and *J. T. Chinnoek*, with an oral argument by *Mr. White*.

Opinion by MR. JUSTICE MOORE.

The question to be considered is whether or not the reply states facts sufficient to show that the proceedings alleged to have been taken by the plaintiff in foreclosing the prior lien on the land bars the defendant from legally asserting any claim to the premises. It will be remembered that the reply avers that the suit to foreclose the superior lien was commenced 14 days before the suit to foreclose the second mortgage was dismissed by the trial court. The pleadings do not show when, where or how the summons in the suit to foreclose the first mortgage was served on the defendant herein. If he was served with process in the county in which the suit was commenced, he was required to appear and answer the complaint within 10 days from the date of such service; but, if he was served in any other county of this state, he was allowed 20 days for that purpose: B. & C. Comp. § 52. If, however, he was served by publication, he had at least six weeks after the suit was commenced in which to appear and answer: B. & C. Comp. § 57. It is therefore impossible to say whether or not the defendant was in default September 30, 1904, when his suit was dismissed.

In the suit to foreclose the superior lien *Lassas*, as the owner and holder of the second mortgage upon the same property, was a necessary party defendant: B. & C. Comp. § 424. If he had appeared and answered in that suit, and could have established the validity of his mortgage, a decree would have been given foreclosing the lien thereof, and specifying the order of time, according to priority, in which the debts secured by the respective liens should have been satisfied out of the proceeds of the sale of the property: B. & C. Comp. § 425. If after September 30, 1904, *Lassas* was legally entitled to appear and answer the complaint in the suit to foreclose the prior lien, and had under-

taken to allege the execution of the second mortgage and the assignment thereof to him, and had prayed for a decree adjudging that he had a lien upon the property, and directing the order of time in which the debts secured should be satisfied out of the proceeds of the sale of the land, such pleading might have appeared in the nature of a contempt of court, when the second mortgage had theretofore been decreed invalid, and by reason thereof the suit instituted to foreclose the lien had been dismissed. In the then condition of such suit, it would seem that Lassas preserved his rights to the property by purchasing it under the decree, given in the suit of the plaintiff herein, by paying therefor the amount of the prior lien and the costs and disbursements of the suit and the expenses of the sale. It will undoubtedly be conceded that if the real property had been sold under the decree to any other person, and a sheriff's deed therefor had been executed to the purchaser, such transfer of the title would necessarily have deprived the defendant herein of all estate in the premises. When, however, he became the purchaser of the real property at an enforced sale thereof, if no redemption therefrom had been made, and by reason thereof a sheriff's deed had been executed to him, he would have obtained all the real interests of the original mortgagors in the premises: Freeman, Executions (3 ed.), § 335. The redemption of the real property by the plaintiff herein abrogated the sale of the premises, and restored to him, as the successor in interest of Lettie McCarty, the estate in the land as if the first mortgage thereon had never been given: *Cartwright v. Savage*, 5 Or. 397; *Settlemyre v. Newsome*, 10 Or. 446; *Flanders v. Aumack*, 32 Or. 19 (51 Pac. 447; 67 Am. St. Rep. 504); *Williams v. Wilson*, 42 Or. 299 (70 Pac. 1031; 95 Am. St. Rep. 745); *Katson v. Storey*, 47 Or. 150 (114 Am. St. Rep. 912; 80 Pac. 217).

Believing that no error was committed in sustaining the demurrer, the decree is affirmed.

AFFIRMED.

Decided 2 July, 1907.

GILMAN v. COCHRAN.

90 Pac. 1001.

PLEADING—SUFFICIENCY OF DEFENSES.

1. Where several complete defenses are pleaded, the defendant is entitled to a verdict if he shall establish any one of them at the trial.

PLEADING—EFFECT OF ADMISSIONS ON PLEA OF LIMITATIONS.

2. Though a failure to deny the allegations of a complaint is an admission thereof, such admission does not preclude the plea of the statute of limitations.

TRIAL—INSTRUCTION AS TO LIMITATIONS—BURDEN OF PROOF.

3. An instruction, in an action on a note, that the note in suit was barred by limitations, and furnished no evidence of liability against defendant, unless there had been a payment made thereon by defendant within six years before action brought, and that the burden of proof to establish the payment was on plaintiff, is not objectionable as ambiguous or misleading, and is a correct statement of the law.

LIMITATION OF ACTIONS—PART PAYMENT—SUFFICIENCY.

4. Under B. & C. Comp. § 25, providing that, if any payment shall be made on an indebtedness after the same shall have become due, the statute of limitations shall run from the time of payment, such payment must have been intended by the debtor as a payment upon the particular debt. In order to toll the statute, and the application of such payment by the creditor in the absence of direction therefor by the debtor is insufficient.

From Morrow: WILLIAM R. ELLIS, Judge.

Statement by MR. JUSTICE EAKIN. .

This is an action by D. E. Gilman against Emmett Cochran to recover upon a promissory note by an indorsee taking the same after maturity. The note was payable to Frank McFarland July 1, 1894, upon which plaintiff claims that a payment of \$20 was made in June, 1900. The payment is denied by the answer, but the execution of the note and that it has not been paid are admitted. An affirmative defense is set up, to the effect that the note was given in consideration of a debt of \$169.30, and that an additional sum of \$500 was included in it to secure the payee for future advances, which the payee agreed to make, but that he thereafter refused to make any advances. Defendant claims that he was damaged in the sum of \$1,000 by reason of such refusal, and he pleads the same as a set-off against the note. As a second affirmative defense he pleads the statute

of limitations against the note. The cause was tried by a jury and a verdict rendered for defendant, from which judgment plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Redfield & Van Vactor*, with an oral argument by *Mr. Charles Edgar Redfield*.

For respondent there was a brief over the names of *S. E. Watson* and *McCourt & Phelps*, with an oral argument by *Mr. Gilbert Walter Phelps*.

Opinion by MR. JUSTICE EAKIN.

1. Plaintiff insists that by the first defense the liability for \$169.30 is admitted, and that the court should have instructed the jury that plaintiff was entitled to a verdict for not less than that amount; but that defense does not expressly admit that plaintiff is entitled to recover any amount, but only admits that at the time of the execution of the note there was a debt of that amount, and plaintiff also pleads a set-off of \$1,000. When defendant has two separate defenses, each of which is upon the pleading complete, if he establishes one upon the trial, he is entitled to verdict, although he wholly failed to establish the other.

2. A failure to deny the allegations of the complaint is an admission thereof, and dispenses with proof, but such admission is not sufficient to preclude the plea of the statute of limitations. The defendant, in order to take advantage of the statute, need not deny the complaint, but may admit all of its facts, and plead that the cause of action did not accrue within six years prior to the commencement of the action. Such a defense presumes or impliedly admits that the cause of action did exist, but is now barred by the statute. In this answer there is only a denial of the payment of \$20 and therefore it impliedly admits all other allegations, and the first affirmative defense does no more. It makes no admission inconsistent with the second defense.

3. Plaintiff also claims error in the instruction to the jury to the effect that the defendant is barred by the statute of limi-

tations. The language of the court in the instruction complained of is:

"The note in suit is barred by the statute of limitations, and therefore furnishes no evidence of a present liability against the defendant, unless there has been a payment made thereon by defendant within six years prior to the commencement of the action, and the burden of proof to establish such payment is upon the plaintiff."

This language is taken verbatim from *Harding v. Grim*, 25 Or. 509 (36 Pac. 634), and is neither ambiguous nor misleading. It plainly infers that the debt is saved from the operation of the statute if there has been a payment within six years after maturity, and is barred without such payment. The burden of all the instructions was to make plain to the jury what constitutes such a payment as will prevent the running of the statute, and we think they correctly state the law.

4. Plaintiff seeks to invoke the rule that, when a payment is made by a debtor owing more than one debt who does not direct to which it shall apply, the creditor may apply it, and that such application to the debt in question will toll the statute; but such is not the law. A payment that will save the running of the statute must have been intended by the debtor as a payment upon that particular debt. This is clearly the intention of the statute. B. & C. Comp. § 25, provides:

"Whenever any payment of principal or interest has been or shall be made upon an existing contract * * if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

It is said by Mr. Justice BEAN in *Harding v. Grim*, 25 Or. 506, 510 (36 Pac. 634, 635): "To raise an implied promise from a part payment of a debt, which will prevent the debtor from availing himself of the bar of the statute, it must appear to have been made and intended as an unqualified part payment of the debt in suit." Payment tolls the statute on the theory that such a payment is an acknowledgment by the debtor of the existence of the debt of which the payment is only a part, and therefore the application of a payment by a creditor to a partic-

ular debt, not directed or intended by the debtor, cannot imply an acknowledgment of a larger debt.

Therefore we find no error in the instructions or rulings of the court below, and the judgment is affirmed. **AFFIRMED.**

Decided 2 July, 1907.

CARROLL v. GRANDE RONDE ELECTRIC CO.

90 Pac. 903.

TRIAL—NONSUIT—QUESTIONS THAT MAY BE DECIDED.

On a motion for a nonsuit, the court has no authority to pass on the merits or adjudicate the rights of the parties, and an attempt to do so is a nullity; such a motion is an objection to the sufficiency of plaintiff's case and does not involve the merits of the claim at all.

In an action for wrongful death, defendant's motion for a nonsuit, on the ground that deceased was guilty of contributory negligence, was granted, the record entry reciting that the deceased was guilty of contributory negligence which was the proximate cause of the injury. *Held*, that the judgment was no bar to a subsequent action on the same cause, the only point properly decided being that plaintiff's case, as presented, was not sufficient in law to be submitted to the jury.

From Union: WILLIAM SMITH, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by Eliza Carroll, administratrix, against the Grande Ronde Electric Co. On August 28, 1905, Leonard Carroll was killed by an electric wire belonging to defendant company. The administratrix of his estate brought an action to recover damages on account of his death, alleging that it was caused by the negligence of defendant. The defendant answered, denying the allegations of the complaint, and, for a further and separate defense, setting up contributory negligence on the part of deceased. The trial was begun before a jury on issues joined, and, after the plaintiff had introduced her testimony and rested, the defendant moved for a nonsuit, on the ground, among others, that the evidence showed that the death of her intestate was caused by his own negligence. This motion was allowed; the record of such allowance reciting "that the plaintiff's intestate Leonard Carroll, at the time of the accident complained of, resulting in his death, was guilty of contributory

negligence, which was the proximate and direct cause of the injury resulting in his death." The judgment was subsequently affirmed: *Carroll v. Grande Ronde Elec. Co.* 47 Or. 424 (84 Pac. 389; 6 L. R. A., N. S., 290). Thereafter the plaintiff commenced this action on the same cause as is alleged in the action heretofore referred to. The defendant pleads the judgment in the former action as a bar, and, such plea being sustained, judgment was rendered in its favor, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Lomax & Anderson*, with an oral argument by *Mr. Gustave Anderson*.

For respondent there was a brief with oral arguments by *Mr. Samuel White* and *Mr. Thomas Griffin Hailey*.

Opinion by MR. CHIEF JUSTICE BEAN.

The statute, after providing that a judgment of nonsuit may be given against the plaintiff on motion of the defendant, when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury (Section 182, B. & C. Comp.), declares that, when such judgment is given, the action is dismissed, but it shall not have the effect to bar another action for the same cause: Section 184, B. & C. Comp. The statute would seem to leave no room for argument as to the effect of an involuntary judgment of nonsuit. But the defendant contends that because, in the case at bar, the entry of the order sustaining the motion contains a statement or finding that the contributory negligence of the plaintiff's intestate was the proximate cause of his death, it is a judgment on the merits, and therefore a bar to another action. The vice of this position lies in the fact that, on a motion for a nonsuit, the court has no jurisdiction or authority to pass upon the merits or adjudicate the rights of the parties, and an attempt to do so is a nullity. A motion by defendant for a nonsuit does not challenge the facts as shown by plaintiff, nor call upon the court to determine the rights of the parties, but only to decide as a matter of law whether upon the evidence of plaintiff, as it now stands, he is entitled to take

the opinion of the jury on his case. It is a motion based on some defect or neglect of the plaintiff, and does not involve the merits. The plaintiff, therefore, is, under all the authorities, authorized, if the motion is sustained to bring his action again: Black, Judgments (2 ed.), § 699; Freeman, Judgments, § 261; *Reynolds v. Garner*, 66 Barb. 319; *Lindvall v. Woods* (C. C.), 47 Fed. 195; *Manhattan Life Ins. Co. v. Broughten*, 109 U. S. 121 (3 Sup. Ct. 99: 27 L. Ed. 878); *United States v. Parker*, 120 U. S. 89 (7 Sup. Ct. 454: 30 L. Ed. 601); *Gardner v. Michigan Cent. R. Co.* 150 U. S. 349 (14 Sup. Ct. 140: 37 L. Ed. 1107). And it can make no difference upon what point the motion is allowed, or how the judgment may be framed, or what recitals it may contain, or that the motion was ordered upon the failure of plaintiff's evidence: 23 Cyc. 1137; 24 Am. & Eng. Enc. Law (2 ed.), 801; Black, Judgments (2 ed.), § 699; *Gummer v. Trustees of Village*, 50 Wis. 247 (6 N. W. 885); *United States v. Parker*, 120 U. S. 89 (7 Sup. Ct. 454: 30 Law Ed. 601). It is still nothing but a judgment of nonsuit, which has been likened to the blowing out of a candle, which a man, at his own pleasure, may light again, and which the statute declares shall not be a bar to another action for the same cause. At the time the motion was made by the defendant, the plaintiff, on her own motion, could have taken a voluntary nonsuit, which certainly would not have been a bar, and she is in no worse position because the court on motion of defendant did what she herself voluntarily could have done. The defendant could have had a judgment which would have been a bar to another action if it had rested, and submitted the case to the jury on plaintiff's evidence, instead of moving for a nonsuit, but it has no right to experiment with a motion for a nonsuit, thus reserving to itself the right, if the ruling is against it, to go into a full trial on the merits, and deny the plaintiff, if she is the losing party, the right to bring her action anew. If the defendant would not be bound by the ruling on the motion, the plaintiff ought not to be. If a judgment of nonsuit, on the motion of defendant, is an adjudication upon the merits, conclusive on the plaintiff,

and a bar to another action, then the correlative rule must be adopted, that a denial of such motion is conclusive upon the defendant, and operates as a judgment for the plaintiff, a position nowhere asserted. No judgment can be an estoppel unless it is on the merits: Freeman, Judgments, § 260. And a motion for a nonsuit is a waiver of the right to have a judgment on the merits, and submits to the court the single question whether the plaintiff has proven a case sufficient to be submitted to a jury, and the sustaining or overruling of the motion is an adjudication of no other matter. The case of *Bartelt v. Seehorn*, 25 Wash. 261 (65 Pac. 185), seems to be contra to this conclusion, but no authorities are cited in its support, and we have been unable to find any, and the rule there announced is against the plain provisions of our statute.

Judgment reversed, and cause remanded for such other proceedings as may be proper, not inconsistent with this decision.

REVERSED.

Decided 2 July, 1907.

FAGAN v. WILEY.

90 Pac. 910.

REFORMATION OF INSTRUMENTS—FRAUD—MENTAL CAPACITY.

1. The evidence does not show fraud by the vendee as to the transaction in question or any taking advantage of the intoxicated condition of the vendor, who was not so drunk as to be incapable of understanding his conduct.

REFORMING CONTRACT FOR DRUNKENNESS OF ONE OF THE PARTIES.

2. To avoid a contract on the ground of intoxication the party seeking relief must have been altogether incapable of understanding his action—which was not the case here.

VENDOR AND PURCHASER—EXCESSIVE PRICE—FRAUD—BURDEN OF PROOF.

3. Where it appears that the price paid by an intoxicated purchaser was exorbitant, and the transaction is questioned for fraud, the burden of proof in showing that advantage was not taken of such purchaser rests on the vendor.

From Wasco: WILLIAM L. BRADSHAW, Judge.

Suit by Patrick Fagan against W. N. Wiley, resulting in a decree as prayed for, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Huntington & Wilson* and *Menefee & Wilson*, with an oral argument by *Mr. Fred Wilson*.

For respondent there was a brief over the name of *Bennett & Sinnott*, with an oral argument by *Mr. Nicholas John Sinnott*.

Opinion by MR. JUSTICE MOORE.

1. This is a suit by Patrick Fagan against W. N. Wiley to reform a promissory note, given by the defendant to the plaintiff August 21, 1904, but by mutual mistake dated 10 years prior thereto, to recover the amount specified in the instrument, and also a reasonable sum as attorney's fees. The defense relied upon is alleged mental incapacity of the defendant, caused by excessive intoxication, of which condition the plaintiff took advantage by persuading him to purchase lot 6, in block 6, in Bigelow's Addition to Dalles City, Oregon, for \$5,000 and to give a note for \$500 as a part of the purchase price; that the sum stipulated to be paid for the land is exorbitant and inequitable as compared with its value, by reason whereof and of the defendant's plight the note referred to is wholly without consideration and void. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, a decree was rendered as prayed for in the complaint, from which the defendant appeals.

Considering the defendant's alleged mental condition at the time the note was given, he testified that on Sunday, August 21, 1904, he visited a saloon at Dalles City at about 11 o'clock in the forenoon, and played cards, taking a drink of whisky probably every half hour until the lights were turned on at night, when he left the building, intending to go home, but that he did not know where he went or what he did, except that he had a faint recollection of having signed some papers; that he could not remember when he reached his residence that night, and the next day he was so ill from the effect of excessive drinking that he remained in bed until 2 o'clock in the afternoon; that two days thereafter he was informed by the plaintiff that he

had purchased the property mentioned and given a promissory note for \$500 in part payment thereof, whereupon he offered to pay any expense that had been incurred in preparing the papers, and demanded their return, claiming that, by reason of his mental incapacity, he was not liable thereon, but the plaintiff refused to comply with his request.

C. P. Johannsen, a saloon keeper, testified that on the Sunday in question, at about 6 o'clock in the evening, Wiley came into his place of business very drunk and staggering. The testimony of this witness is corroborated as to the defendant's condition, by W. Dalrymple and E. P. Farley, who saw Wiley on the street about the hour last mentioned. T. Hayden and John Crate severally testified that on the evening referred to the defendant was drunk. J. Parodi testified that about 8 o'clock that night, as he and one T. A. Wood were standing on a street corner in front of a saloon, the defendant approached them in a drunken condition, and soon thereafter the plaintiff came along, whereupon the conversation turned upon real property; that, at Fagan's invitation, they entered the saloon, where it was agreed that Wiley would buy the plaintiff's lot for \$5,000. Wood corroborates Parodi's testimony, except that he states that Fagan was talking with them on the street about the value of certain property, when the defendant arrived and offered \$5,000 for the lot mentioned, in answer to Fagan's inquiry as to what he would give for it, and, in referring to the defendant's condition at that time, he testified as follows: "As far as I could understand Mr. Wiley's conversation, it was perfectly rational and in a business way." It also appears that about 9 o'clock that night the parties subscribed their names to a contract, which, omitting their signatures and the names of the subscribing witnesses, is as follows:

"The Dalles, Oregon, Aug. 20, 1904

I agree to sell my property, situated on the corner of Third and Federal streets in Dalles City, Oregon, to W. N. Wiley for the agreed price of \$5,000.00 (five thousand dollars). Payments to be made as follows: One thousand (1,000.00) in one year; one thousand (1,000.00) in two years, and two thousand

five hundred in three years. All to be at the rate of six per cent interest after deeds are made out, and Mr. Fagan is to finish the gutter on sidewalk from Fourth St. to Third, and also Mr. Fagan is to collect rent from the premises to the 15th of August, 1904.

I acknowledge the payment this day of five hundred dollars (\$500.00) on above contract."

The promissory note sought to be reformed is the payment referred to in the memorandum quoted. As these papers were prepared and signed on Sunday, they were dated as of the preceding day, except that the note contained in the upper right-hand corner the printed figures "189—," after which the figure 4 was annexed. Crossen, as plaintiff's witness, having testified that he prepared and reduced to writing the contract as the parties thereto mutually considered and agreed upon the terms, was interrogated as follows:

"I will ask you to state what was Mr. Wiley's mental condition at the time he signed this contract and discussed the matter and signed the note?"

And the witness replied:

"Well, his mind seemed clear."

The opinion thus expressed is corroborated by several other witnesses. The value of the real property at the time the contract was signed was about \$2,500 or \$3,000, as estimated by N. Whealdon and W. A. Johnson, respectively, who were competent to determine the worth thereof. The testimony further shows that the defendant owned at that time three lots which joined the premises described in the answer, and, when the contract was prepared, he stated that the land which he was buying was worth more to him than to any other person.

2. The use of beverages containing alcohol invariably causes intoxication, the degree of which does not, like other poisonous substances taken into the human system in a given time, always depend upon the quantity imbibed, but the race and the age, habits and physical and mental condition of the particular individual thereof are factors which explain and largely account for the measure of inebriety. As there are so many elements

necessarily to be considered in determining the mental condition resulting from intoxication, which does not affect all persons alike, the degree of exaltation or depression is always a question of fact and never of law, or made to depend upon the quantity of alcohol swallowed in a stated period by a person whose capacity or responsibility is the subject of judicial inquiry: 14 Cyc. 1104. "Where a person," says a text-writer, "seeks to avoid responsibility for a contract on the ground of intoxication alone, it must appear that the drunkenness was so excessive that he was utterly deprived of the use of his reason and understanding, and was altogether incapable of knowing the effect of what he was doing. Any degree of intoxication which falls short of this will furnish no ground for release, in the absence of fraud on the part of the other contracting party. Mere ordinary drunkenness will not of itself avoid a deed or contract. The fact that a party is too much intoxicated to transact business safely, or is laboring under excitement from the use of intoxicating liquors, or is even so much under the influence of drink that his reason, memory and judgment are impaired, or he does not clearly understand the business in hand, does not imply such intoxication as will enable him to avoid his contracts": 17 Am. & Eng. Enc. Law (2 ed.), 401. The answer avers that the plaintiff took advantage of the defendant's intoxicated condition, and persuaded him to purchase the real property. The testimony shows that in a general conversation on the street about the value of land, participated in by the plaintiff and defendant in the presence of T. A. Wood and J. Parodi, the plaintiff inquired of the defendant what he would give for the lot described in the answer, and, upon the latter's offering \$5,000 therefor, the bargain was closed, and at Fagan's request all the persons mentioned repaired to a saloon to take a social glass. A careful examination of the testimony fails to show any conduct upon plaintiff's part in relation to the transaction that can be characterized as fraudulent, or that he invited the defendant to take a drink or participated with him in any indulgence of the liquor habit until their minds had met in consummating the contract.

The declarations upon oath of J. B. Crossen, who is a reputable person, corroborated as it is by the testimony of other witnesses, convince us that the defendant at the time mentioned was not deprived of his memory or judgment, or that he was incapable of comprehending the nature or effect of his acts, and hence he had sufficient mental capacity to render him liable for his contracts.

3. It is argued by counsel for the defendant, however, that the sum which he stipulated to pay for the real property is so much in excess of its real value as to afford indisputable evidence of fraud, when Wiley's mental excitement, caused by excessive drinking, is considered, and, this being so, as the contract is only executory, and neither party has changed his condition in consequence of the alleged agreement, an error was committed by the trial court in not decreeing that the defendant was exonerated from liability on the obligations to which he subscribed his name. It must be admitted that the price which the defendant stipulated to pay for the land is exorbitant, and such disparity, coupled with the alleged inebriety, imposed upon the plaintiff the burden of showing the perfect good faith of the transaction: 2 Pomeroy, Equity (3 ed.), § 928. We think he has done this and established the fact that he was not guilty of any misconduct, and that the inadequacy of consideration is not so gross as to afford evidence of constructive fraud, when it is remembered that the defendant owned real property joining the lot which he agreed to purchase and that he said that the land which he stipulated to buy was of greater value to him than to any other person.

It is also maintained by defendant's counsel that the description of the land, as given in the written memorandum, shows that the contract is too indefinite for specific performance, and, if a contrary conclusion should be reached, the testimony discloses that, as two houses are standing on the premises, the building erected at the corner of the street mentioned will supply the specification; and hence an error was committed in awarding the relief granted. Though the answer correctly de-

scribes the real property, and the reply admits that the defendant agreed to purchase from the plaintiff the premises thus particularly mentioned, it is insisted by defendant's counsel that they never had an opportunity to inspect the contract until it was offered in evidence at the trial, and, supposing it contained a correct description of the land, they should not be bound by their averment. An order of court could undoubtedly have been secured that would have permitted an examination of the contract before the answer was filed (B. & C. Comp. § 533), if it had been considered necessary, but, failing to obtain it, no error was committed as alleged.

It follows that the decree should be affirmed, and it is so ordered.

AFFIRMED.

Decided 2 July, 1907.

LONGFELLOW v. HUFFMAN.

90 Pac. 907.

SALES—CONCURRENT ACTS.

1. An agreement by a debtor to sell to his creditor specified chattels at a fixed price for each, the total to be applied on the vendor's note, and by the creditor to accept the specified chattels at the price stated and credit the price on such note, is one requiring the performance of concurrent acts, and neither can claim default against the other without himself being ready, able and willing to perform his part.

PLEADING—AMENDMENT—DISCRETION OF COURT.

2. A motion for an amendment of the complaint during trial is addressed to the discretion of the trial court, which is not subject to review, in the absence of a manifest abuse.

CONTRACTS—EFFECT OF REFUSAL BY ONE PARTY.

3. A declaration by one party to a contract, made prior to the time fixed for performance, that he will not comply with the contract, may excuse an offer to perform by the other party before bringing action for a breach, but it will not excuse him from being able to perform his part.

CONTRACTS—GENERAL RESULTS OF REPUDIATION.

4. The effect of a repudiation of a contract by a party thereto and the remedies available to the other party are discussed.

From Wallowa: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by N. C. Longfellow against John W. and Arnold R. Huffman to recover damages for a breach of the following contract:

"This Agreement, made and entered into this 2d day of November, 1904, by and between John W. Huffman and Arnold R. Huffman, partners doing business under the firm name and style of Huffman & Son, parties of the first part, and N. C. Longfellow, party of the second part, Witnesseth:

That in Consideration of the price of one dollar and fifty cents (\$1.50) per head to be paid therefor by the second party, the parties of the first part hereby agree to sell and deliver to the second party all the lambs to be raised during the years 1905 and 1906, from a certain band of sheep now owned by the first parties and branded with, thus X, black paint. Said lambs to be delivered on or about October 1 in each of said years, at some convenient corral in Wallowa County, Oregon, at which time of delivery the amount of the price of said lambs shall be credited on a certain promissory note executed by the first parties in favor of the second party, dated October 1, 1904, for the sum of \$2,676.00 and interest.

The Second Party Hereby Agrees to accept and receive said lambs at the time, place and price above specified, and to credit the amount of the price thereof on the promissory note above described.

In Witness Whereof, the said parties have hereunto set their hands in duplicate, at Joseph, Oregon, this the said 2d day of November, 1904.

John W. Huffman and
Arnold Huffman,
by John W. Huffman,
Parties of the First Part.
N. C. Longfellow,
Party of the Second Part.

In presence of
J. A. Rumble,
F. V. Bowman."

The complaint, after alleging the making of the contract and setting it out *in haec verba*, avers that prior to October 1, 1905, defendants raised from the band of sheep described not less than 1,400 lambs of the reasonable market value of \$3 a head, or \$4,200; that at the time and place of delivery specified in the contract plaintiff was, and ever since has been, ready, able and willing to accept said lambs, and credit the stipulated price thereof on the promissory note mentioned in the contract, but that defendants have wholly failed and refused to deliver the same or any part thereof, although requested so to do, to plaintiff's damage in the sum of \$2,400.

Defendants by their answer admit the making of the contract, deny each and every other allegation of the complaint, and for an affirmative defense aver that on October 1, 1905, they purchased of plaintiff the band of sheep mentioned in the agreement sued on, and, as part of the consideration, executed and delivered to him their promissory note for \$2,676, due on or before two years after date, and bearing interest at 10 per cent per annum; that thereafter, and on November 2, 1904, they entered into the contract sued upon for the purpose of securing payment of such note, and to permit them to pay the same in lambs at \$1.50 per head; that prior to the maturity of the contract plaintiff sold and assigned the note to one Frank Hershy, since which time he has not been the owner and holder thereof and has been unable to comply with his contract and credit the price of the lambs thereon; that before the commencement of this action defendants paid to Hershy the full amount due on the note. The reply denies each and every material allegation in the answer, and affirmatively alleges that the promissory note referred to was secured by a chattel mortgage on the band of sheep mentioned in the agreement in suit and their increase, which mortgage was, at the time of making such contract, and for a long time prior and subsequent thereto, a valid and subsisting lien upon the lambs described in the complaint; that it was understood and agreed between plaintiff and defendants, at the time the contract in suit was executed, that it was a contract of sale, and not a mortgage.

Upon the issues thus joined the cause went to trial before the court and a jury. The plaintiff was called as a witness in his own behalf, and, among other things, testified that on or about September 1, 1905, he informed one of the defendants that he would accept a delivery of the lambs about the 16th or 18th of the month, but that defendant said he was not going to deliver them at all; that about 10 days later he had another conversation with defendant, and inquired if he intended delivering the lambs, and defendant said, "No, I don't have to turn them over to you, and I ain't a going to"; that he went down

to defendant's place about the 1st of October, 1905, and told him that he came to see if he was going to turn over the lambs to him, and defendant said he was not. He further testified in chief that he was ready, able and willing to perform his part of the contract, and to credit the price of the lambs on the note aforesaid, and that defendants never offered to deliver the lambs at any time or place. On cross-examination he was required to testify, over the objection and exception of his counsel, that about the time the contract sued on was made he assigned and transferred the note mentioned therein, and the mortgage given to secure its payment, to Frank Hershy, of the State of Nebraska, as collateral, and that the note has not since been in his possession or under his control; and also that he did not tender or offer any money to defendants at any of the times he demanded performance of the contract by them. On redirect examination, he was asked by his counsel to state the purpose for which the note and mortgage was transferred to Hershy, but the court refused to allow him to do so. Thereupon he asked and obtained leave to amend his reply by averring that such transfer was not an absolute sale, but a mere pledge or collateral security, and that he had a right to redeem at any time. Questions as to the purpose of the transfer were again renewed, but the court sustained an objection thereto, on the ground that the evidence sought was incompetent and immaterial, and not within the issues of the case. Plaintiff then asked leave to amend his complaint by pleading a repudiation of the contract by defendants prior to the time for performance, but the court denied the application, and, on motion of defendants, granted a nonsuit.

AFFIRMED.

For appellant there was a brief over the names of *O. M. Corkins* and *Daniel Webster Sheahan*, with an oral argument by *Mr. Sheahan*.

For respondents there was a brief over the names of *T. H. Crawford* and *John Simeon Hodgin*, with an oral argument by *Mr. Hodgin*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The plaintiff contends that the stipulation in the contract between him and defendants that the purchase price of the lambs should, at the time of delivery, be credited on the promissory note mentioned in such contract, was an independent and subsidiary covenant, which could be broken by him without impairing his right to recover damages on a refusal of the defendants to deliver the lambs as agreed upon. But, as we construe the contract, the delivery of the lambs by the defendants, and the crediting of the price thereof on the promissory note, were made concurrent acts. The defendants agreed they would deliver the lambs to plaintiff for a stipulated price, at a certain time and place, and plaintiff agreed, in consideration thereof, that at the time of delivery he would credit the purchase price on the promissory note. The two acts were to take place concurrently, and the performance of one was dependent upon the performance of the other. The defendants were not required to deliver the lambs unless the credit was made and plaintiff was not obliged to make the credit until the delivery. Neither party could put the other in default without performance or an offer to perform on his part. It is therefore incumbent upon plaintiff, before he can recover damages for a breach of the contract by the defendants, to allege and prove performance or readiness and willingness to perform or some legal excuse for nonperformance: 9 Cyc. 645; *Lewis v. Craft*, 39 Or. 305 (64 Pac. 809); *Catlin v. Jones*, 48 Or. 158 (85 Pac. 515).

By his complaint he places his case on the ground that he was ready, able and willing to perform his part of the contract by crediting the purchase price of the lambs on the note mentioned in the agreement at the time and place of delivery. Upon this theory, he must recover in this action, if at all. His complaint cannot be aided in this regard by the averments of the reply. Now, it appears from plaintiff's testimony that he was not able at the time defendants refused to deliver the lambs to comply with his part of the contract. The note was not at that time in his possession or under his control. He had previously as-

signed and transferred it to another, and it was out of his power to make the proper credit. That the transfer was intended as collateral security does not change the result. The fact still remains that he did not have the note in his possession, and could not make the proper credit thereon. The defendants were not obliged to make the delivery and rely upon a promise of plaintiff to see that the proper credit was subsequently made. They had a right to insist that it be made at the "time of delivery," and, if plaintiff was unable to make it at that time, they were not bound to make delivery. Therefore the motion for nonsuit was properly allowed.

2. The plaintiff applied to the court, during the progress of the trial, for leave to amend his complaint by pleading a repudiation of the contract by defendants prior to the time for delivery. The allowance of this motion was within the discretion of the trial court, and its ruling cannot be disturbed here unless there was a manifest abuse of discretion, which does not appear. But, if the complaint had been amended as desired, it would not have stated a sufficient excuse for plaintiff's inability to perform his part of the contract.

3. A declaration by one party to a contract, made prior to the time fixed for performance, that he will not comply with such contract, if not withdrawn, may dispense with or excuse an offer to perform by the other party before bringing his action: 1 Beach, *Modern Law Contracts*, § 411; *Howard v. Daly*, 61 N. Y. 362 (19 Am. Rep. 285); *Bissell v. Balcom*, 39 N. Y. 275. But it does not ordinarily excuse ability to perform.

4. "It is well settled," says the Supreme Court of Illinois, "that, where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover, under the contract; or he may

treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to such recovery, the plaintiff must allege and prove performance upon his part, or a legal excuse for nonperformance": *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 80 (38 N. E. 777: 30 L. R. A. 33). If it is true, as argued by plaintiff in his brief, but denied in his pleadings, that defendants voluntarily paid and discharged the promissory note before the time for performance had arrived, and thus by their own act put it out of the power of plaintiff to perform his part of the contract, that fact should have been averred in the complaint as an excuse for nonperformance, and is unavailing to the plaintiff until so pleaded.

Upon this record there is no error in allowing and granting the motion for a nonsuit. The judgment is therefore affirmed.

AFFIRMED.

Mr. Justice EAKIN, having presided at the trial below, took no part in this decision.

Argued 30 April, decided 2 July, rehearing denied 20 August, 1907.

WILLIAMS v. COMMERCIAL NATIONAL BANK.

90 Pac. 1012, 91 Pac. 443.

EVIDENCE—PRESUMPTIONS—WITHHOLDING EVIDENCE.

1. Where, in an equitable proceeding, the good faith of a party to a transaction under consideration is questioned by the complaint and evidence, and such party holds back proof exclusively within its control, or fails to produce it on demand, the law puts the interpretation upon such conduct most unfavorable to such party.

CREDITORS' SUIT—EFFECT OF EVIDENCE.

2. The evidence adduced justifies the conclusion that Wells, Fargo & Co. was the real purchaser of the stock and assets of the Commercial National Bank in 1894 and 1898.

CORPORATIONS—LIABILITY OF TRANSFEREE OF ASSETS.

3. Where a corporation transfers all its assets, with a view to going out of business, and nothing is left with which to pay its debts, the

transferee is charged with notice of the circumstances of the transaction, and takes the assets subject to an equitable lien for the unpaid debts of the transferring company, the property of a corporation being a fund subject to be first applied to the payment of debts.

CORPORATIONS—LIABILITY OF STOCKHOLDERS FOR DISTRIBUTIONS.

4. Where a stockholder receives the assets of a corporation upon its liquidation, leaving it without funds to pay its creditors, he can be required to refund the full amount in a suit by a creditor to follow the assets of the corporation.

CREDITORS' SUIT—CORPORATIONS—EXHAUSTION OF LEGAL REMEDIES.

5. Where creditors have reduced their claims against a corporation to judgments and have had executions returned *nulla bona*, they have exhausted their remedies at law, and may proceed in equity to follow the corporation's assets into the hands of a transferee.

CREDITORS' SUIT—CORPORATIONS—ACCRUAL OF RIGHT OF ACTION.

6. In a proceeding in the nature of a creditors' bill to reach the assets of a liquidated corporation placed beyond the reach of legal process in fraud of creditors, the statute of limitations does not begin to run until the return of execution *nulla bona* upon plaintiff's judgments against the corporation.

SAME—LIMITATION OF ACTION.

7. Where a corporation made a transfer to defendant, valid as between them and only constructively fraudulent as to creditors of the corporation, because it deprived it of means to pay its debts, the remedy of the creditors against defendant is equitable and not primary; and judgment against the corporation and execution thereon returned *nulla bona* are prerequisites to its suit against defendant, so that limitations against the suit commence to run, not from the time of the transfer, or even from the time of plaintiffs' discovery of the property, but only from the return of the execution *nulla bona*.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by George H. Williams and others against the Commercial National Bank of Portland and Wells, Fargo & Co. (in which H. C. Leonard intervenes), to collect from defendant Wells, Fargo & Co., hereafter referred to as defendant company, judgments rendered in favor of plaintiffs severally against defendant the Commercial National Bank. Decree was rendered for plaintiffs, and the defendant company appeals. In 1894 plaintiffs were stockholders in the Commercial National Bank, and, the bank being in financial straits, the stockholders sought the defendant company to come to its aid by purchasing part of its stock, and thus lend its name to give the bank standing, and on January 1, 1894, 1,000 shares of the capital stock

of defendant bank were purchased, the certificates for which were taken in the names of officers and stockholders of defendant company, and thereafter, in March, 1894, the capital stock of the defendant bank, at the request of the new stockholders, was increased from \$250,000 to \$500,000, and the stock for the whole of such increase was issued in the names of various officers and stockholders of defendant company. New directors were named by them, who thereafter controlled the defendant bank, and in September, 1896, the new management procured from the controller of the currency an order requiring that an assessment of 50 per cent be made upon said capital stock. Eighty thousand dollars of such stock was owned by the plaintiffs and other small stockholders, and the balance by such new management; and, in default of payment of such assessments by plaintiffs, the bank directors sold their stock on May 5, 1897, to pay the assessments thereon. Soon thereafter the stockholders of defendant bank passed a resolution to liquidate the bank, fixing October 4, 1897, for such liquidation, and on that date the defendant company took over the principal part of the assets and business of the defendant bank and continued the bank business at the same place and on the same assets, but in the name of Wells-Fargo Bank, assuming to pay all defendant bank's depositors, after which defendant bank ceased to do business as such. Thereafter, on July 13, 1898, defendant company purchased from the defendant bank the remaining assets of the bank for the consideration of \$250,000. In such purchase no money changed hands, but the transaction was strictly a matter of entries in the books of the two concerns, and it is claimed by the defendant company that the \$250,000 was distributed to the stockholders of the defendant bank as dividends, and in December, 1899, plaintiffs each brought action against defendant bank for damages for the conversion of its stock in the sale made on May 5, 1897. Such actions were defended by the defendant company, and by it appealed to the state supreme court, and thereafter to the United States Supreme Court, which resulted in final judgments in favor of plaintiffs in the United States Supreme

Court on January 18, 1904. On March 2, 1904, mandate therefrom was filed in the circuit court and executions issued and returned *nulla bona*, and thereafter this suit was commenced September 9, 1904, in which it appears that defendant bank had no officers, clerk or agent, and but two stockholders in this state at the time of the commencement thereof, or for several years prior thereto. Wells, Fargo & Co. appeal from a decree for plaintiffs and intervenor. **AFFIRMED.**

For Wells, Fargo & Co. there was a brief over the name of *Snow & McCamant*, with oral arguments by *Mr. Wallace McCamant*.

For Leonard, intervenor, there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Chester Valentine Dolph*.

For respondents there was a brief over the name of *Thomas O'Day*, with oral arguments by *Mr. George Henry Williams*, *in pro. per.*, *Mr. O'Day* and *Mr. George Hannibal Durham*.

Opinion by MR. JUSTICE EAKIN.

The principal questions involved in this case are: (1) Is the defendant company liable to plaintiffs either as a stockholder for dividends received upon its stock, or by reason of having caused the liquidation of the defendant bank and having taken over its assets? (2) Is it necessary that the plaintiffs procure a lien upon the property before they have a standing in equity to sue defendant company? (3) Are plaintiffs barred by the statute of limitations? That is, is this a concurrent, equitable proceeding to which the statute applies? (4) If the statute applies, does it begin to run from the date of plaintiffs' judgments, or from the date defendant company received the property?

1. We think it sufficiently appears from the pleadings and proof that the defendant Wells, Fargo & Co. was the real purchaser of the 1,000 shares of stock in the defendant bank purchased in 1894 in the name of persons connected with defendant company, and also of the increase of the capital stock of the

defendant company in that year, viz., 2,500 shares. The evidence relating to these matters was particularly within the control of defendant company. The account books of the defendant bank were called for by plaintiffs, being in defendant company's control and most of them without the state at the time of the trial, and the defendant company did not attempt to dispute the facts disclosed by the testimony produced by plaintiffs in relation to the ownership of the stock. Defendants' principal witness stated that, after the purchase of said thousand shares of stock in defendant bank, the management of the defendant bank and of the defendant company were identical. As stated by defendant company's counsel in his testimony at the trial, the good faith of defendant company in all these matters is questioned by the complaint and proof, and in an equity proceeding questioning the integrity of the transfer the defendant company cannot ignore the allegations and proof offered by the plaintiffs, and hold back proof, oral or record, that is exclusively within its control, without leaving the inference that such proof would be unfavorable to it. It is said in *Helms v. Green*, 105 N. C. 251 (11 S. E. 470; 18 Am. St. Rep. 893): "The fact that it is exclusively within the power of persons so nearly related (as the defendant in this case and his father-in-law * *) to explain every suspicious circumstance, if they did act in good faith, and the neglect to do so * * is to be considered as due to inability to show that their conduct was consistent with an honest purpose; * * and where the parties to it withhold testimony that is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party, as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not accessible to his adversary." To the same effect are *Wharton*, Evidence, § 1266. *et seq.*; *Knight v. Capito*, 23 W. Va. 639; *Glenn v. Glenn*, 17 Iowa, 498; *Shapira v. Paletz*, 59 S. W. (Tenn. Ch. App.) 774; *Chattanooga R. & C. R. Co. v. Evans*, 66 Fed. 809 (14 C. C. A. 116); *Mace v. Roberts*, 97 Wis. 199 (72 N. W. 866).

The defendant bank's officers were out of the state at the time of the trial of this suit. Plaintiff sought to obtain the books of the defendant bank, and called as a witness defendant company's attorney, who had also been the attorney for the defendant bank, for the purpose of establishing the facts in relation to the ownership of the stock in defendant bank, and the transfer of the assets of defendant bank to the defendant company, the purchase of the remnant of the bank's property, and payment of dividends therefrom. Defendant company refused to produce the books or to disclose anything in relation to these matters, and, even if the plaintiffs did not use due diligence to secure the bank books, yet, if the facts in relation to these matters were not as plaintiffs claimed, it was within the power of defendant company to produce the books and witnesses to show the truth; and it was to their interest to do so, and the law puts the interpretation upon such conduct most unfavorable to defendant company when it purposely or negligently fails to furnish evidence under its control and not accessible to its adversary.

2. Plaintiffs produced as witnesses men who were officers of defendant bank up to the time of its liquidation, and who were officers of defendant company's bank, as successor of defendant bank, from whose testimony and other circumstances proven the conclusion is irresistible that defendant company furnished the money for the purchase of the 1,000 shares of stock in January, 1894, and the 2,500 shares in March of that year, and dictated the policy of defendant bank, and was the real owner of such stock. At the time of the transfer the officers and stockholders of defendant bank and defendant company consisted largely of the same individuals and the case calls for a disclosure of matters exclusively within defendant company's knowledge or control relating to the transaction; and we feel justified in holding that defendant company was the real owner of the 4,000 shares of the stock of the defendant bank during all the time after the purchase until the liquidation of the defendant bank (1 Cook, Corporations, § 253; *National Foundry & Pipe Works v. Oconto*

Water Co., D. C., 68 Fed. 1006), and had full knowledge of the defendant bank's affairs, its assets and liabilities, and its relations to plaintiffs. At the time of the liquidation of the defendant bank, which was brought about by the defendant company, said company took over the assets of the bank as owner, with the purpose to, and did, continue the same business in the same building and upon the same assets, but in its own name. It claims to have paid value for all it received from the bank, but that seemed to be true only in the sense that it paid it with the property of the bank in assuming to pay the bank's depositors from its assets. It claims to have purchased the remnant of the assets left after taking over the business in 1897, and that the bank declared a dividend to the stockholders from the price paid, but the purchase and the payment of dividends seem to have been merely a transaction of book entries. The situation, then, is that defendant company did not take the assets of defendant bank, either in what it absorbed in October, 1897, or claims to have purchased in July, 1898, in the due course of business, nor is it an innocent purchaser, but absorbed the defendant bank for the purpose of continuing the business in its own name, and so dealt with said property, charged with full notice of the liability of the assets of the defendant bank for its debts, and took the same *cum onere*.

3. In 10 Cyc. 1265, under the heading, "Selling Out to New Corporations," it is stated: "It is not necessary to say that a corporation cannot sell or in any way alien its property, to the prejudice of its creditors, so as to hinder, delay or defraud them in the collection of other debts owing by it; and in general, whenever a conveyance is made by a corporation under such circumstances as would characterize it as a fraud upon creditors if made by an individual, it will be set aside in equity at the suit of such creditors, or other appropriate relief will be accorded them. * * Where one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the

creditors of the selling corporation. This is a necessary extension of the doctrine that the assets of a corporation are a trust fund for its creditors. Such being the quality which equity annexes to them, when the corporation elects to go out of existence, to dispossess itself of them, and to transfer to another corporation, equity follows the trust fund into the hands of the new taker, and charges the property in the hands of such taker with the debts of the transferor. In other words, the corporation receiving the assets is charged in equity, as a trustee in respect of such property, with the payment of the debts of the antecedent corporation. And, while the right to follow a trust fund into the hands of a third party depends upon the answer to the inquiry whether such third party took it with knowledge of the trust, the case being one where the trustee who transferred it to him had a power of disposition, yet in such a case as we are supposing, where one corporation transfers all its assets to another, not in the ordinary course of business, the very circumstances of the case imply full knowledge on the part of the transferee of all the facts necessary to charge the property in his hands with the debts of the transferor." It is not necessary that a fraudulent intent or want of consideration be disclosed. The property is a fund that the law sets apart or charges with a lien in favor of creditors. The debtor corporation cannot dispose of it or encumber it to the prejudice of the creditors, and such a grantee with notice takes it subject to such equitable lien. The above text is supported by many cases, viz.: *National Bank v. Texas Invest. Co.* 74 Tex. 437 (12 S. W. 101); *Sanger v. Upton*, 91 U. S. 60 (23 L. Ed. 220); *Bartlett v. Drew*, 57 N. Y. 589; *Railroad Co. v. Howard*, 74 U. S. (7 Wall.) 409 (19 L. Ed. 117); *Kendall v. Stokes*, 44 U. S. (3 How.) 87 (11 L. Ed. 506); *Clapp v. Peterson*, 104 Ill. 30; *Chicago, etc., Railway Co. v. Chicago Bank*, 134 U. S. 76 (10 Sup. Ct. 550: 33 L. Ed. 900); *Vance v. McNabb Coal, etc., Co.* 92 Tenn. 47 (20 S. W. 424); *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* (C. C.), 13 Fed. 516; *Harrison v. Union Pac. Ry. Co.* (C. C.), 13 Fed. 524; *Brum v. Merchants' Mut. Ins. Co.* (C. C.), 16 Fed. 143.

In *Blair v. St. Louis, H. & K. R. Co.* (C. C.), 22 Fed. 38, Mr. Justice TREAT says: "Was not, however, the respondent's demand now judicially ascertained one of the obligations assumed? Such seems to be a fair construction of the terms of said conveyance; but, if not so, the general principle must control, viz., that a grantee of corporate assets, as in this case, takes *cum onere*, that it must, under the facts disclosed, be treated as the successor of the prior corporation charged with a trust as to assets received." This suit was instituted to establish the superiority of this equitable lien over a subsequent mortgage given by the transferee company, and it is held superior if the mortgagee took with notice of the plaintiff's claim. The authorities seem to be uniform to the effect that the assets of the corporation are subject to an equitable lien in favor of the creditors, and that such creditors may follow such assets or the proceeds thereof into whose ever hands they can trace them and subject them to such debts, except as against a *bona fide* purchaser for value. And, where a corporation transfers all its assets to another corporation with a view of going out of business, and nothing is left with which to pay its debts, such transferee is charged with notice by the very circumstances of the transaction, and takes the same *cum onere*. Such a case cannot be considered a sale in the due course of business, even though based on a valuable consideration, as it operates as a fraud against the creditors.

4. Counsel for defendant claims, and some cases cited in his brief hold, that the remedy of plaintiffs is only *pro rata* against the stockholders, but many of these cases are based upon the remedy in the right of the corporation by a receiver or a creditor for the amount of unpaid capital stock, or upon the liability of the shareholder beyond the par value of his stock under the United States national bank statute, such as the case of *United States v. Knox*, 102 U. S. 422 (26 L. Ed. 216), and *Terry v. Tubman*, 92 U. S. 156 (23 L. Ed. 537). But none of these cases are applicable upon the right of the creditor to follow the assets of the bank as such. Where a person, whether

a stockholder or not, receives the assets of a corporation upon the liquidation of the corporation, whether insolvent or not, if it leaves the corporation without assets with which it can be made to respond to its creditors and the suit is to reach the assets as such or their value, undoubtedly such person should be required to respond to the full amount of the assets so received. In *Hatch v. Dana*, 101 U. S. 213 (25 L. Ed. 885), Mr. Justice STRONG, distinguishing *Pollard v. Bailey*, 87 U. S. (20 Wall), 520 (22 L. Ed. 376), and *Terry v. Tubman*, 92 U. S. 156 (23 L. Ed. 537), concludes: "We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and, if so, it was quite in their power to secure its protection." To the same effect are *Clapp v. Peterson*, 104 Ill. 30; *Bartlett v. Drew*, 57 N. Y. 589; *Marsh v. Burroughs*, 1 Woods, 463 (Fed. Cas. No. 9,112). It is clear from these authorities that, where the proceeding is in the nature of a creditors' suit to follow the assets of the insolvent corporation in the creditor's own right to have his debt satisfied out of particular property, as said in *Bartlett v. Drew*, 57 N. Y. 589, "it is quite immaterial that the defendant is a stockholder." It is the business of the stockholders to adjust the equities between themselves; but, if defendant company has property of the bank or its proceeds which is liable for the payment of its debts, and is taken with knowledge of that fact, then it is liable in such a suit as this.

5. Counsel for defendant insist that plaintiffs have no standing in equity without first bringing themselves in privity with the property sought to be reached by this suit by attachment or judgment lien, but we think the authorities he cites in support of his position are inapplicable here. 12 Cyc. 19, cited by him, makes the distinction thus: "There are two classes of the cases where a creditor is permitted to come into equity for relief after he has obtained a judgment at law: the one class where

his judgment or execution has given him a lien; * * the other class where he comes into equity to obtain satisfaction of his debt out of property of the debtor which cannot be reached at law. In the latter case, * * the relief depends upon the creditor having exhausted his remedies at law." The authorities cited by defendant come with the first class above, and the case at bar in the second. Our own court also recognizes this distinction. In *Dawson v. Coffey*, 12 Or. 513, 519 (8 Pac. 838), Mr. Justice WALDO says: "But, if you wish to reach equitable assets, or other things not subject to execution at law, you must show that you have exhausted your remedies at law." In *Fleischer v. Bank of McMinnville*, 36 Or. 553, 562 (60 Pac. 603), Mr. Justice BEAN cites this case with approval in support of the statement: "It is settled that before a creditor can maintain a bill to set aside the fraudulent conveyances of his debtor he must either establish his claim by judgment, or acquire a lien by attachment." See, also, *Multnomah Street Ry. Co. v. Harris*, 13 Or. 198 (9 Pac. 402); *Sabin v. Anderson*, 31 Or. 487 (49 Pac. 870); *Wyatt v. Wyatt*, 31 Or. 531 (49 Pac. 855). Therefore plaintiffs have done all the law requires of them, and all that they could do by reducing their claims to judgments and having executions returned *nulla bona*.

6. Defendant invokes the statute of limitations of six years (B. & C. Comp. § 6), claiming that it commences to run from the date defendant company obtained the property of the defendant bank. Plaintiffs rely upon two answers to this plea of the statute: (1) That this is a pure equity, and therefore the statute does not apply; (2) that, if the statute does apply, it does not begin to run until they have a cause of suit against the defendant, viz., obtain judgment and return of execution *nulla bona*. The particular purpose of this suit or the relief sought is not such as might be the subject of an action at law, but since the property of the corporation is a primary fund, from which creditors are to be paid, and which plaintiffs seek to reach, and has been placed beyond the reach of legal process, whether by fraudulent or fair dealing, is immaterial, it is in effect a fraud

against creditors: *Powell v. Oregonian Ry. Co.* (C. C.), 38 Fed. 187. But defendant company claims that the statute runs in its favor upon its liability to defendant bank from the date that it received the assets, and that the plaintiffs are seeking to be subrogated to the rights of the defendant bank, and, the remedy being concurrent, plaintiffs are also barred, as held in *Hawkins v. Donnerberg*, 40 Or. 97 (66 Pac. 691, 908). But plaintiffs are not seeking to be subrogated to the rights of the corporation. The corporation by a corporate act went into liquidation and turned over its assets to defendant company and wound up its affairs, and has no officers or directors within the state, and has practically ceased to exist: *Walser v. Seligman* (C. C.), 13 Fed. 417; *Harrison v. Union Pac. Ry. Co.* (C. C.), 13 Fed. 525. Every director must be a stockholder and reside in the district; and when he becomes disqualified, he thereby vacates his place: Rev. Stat. U. S. § 5146 (5 Fed. Stat. Ann. 104; U. S. Comp. St. 1901, p. 3463). In *Graham v. Railroad Co.* 102 U. S. 148, 161 (26 L. Ed. 106), it is held: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund." As between themselves, the bank has no claim upon defendant company. It owes the bank nothing, nor did it commit any wrong against the bank, and this suit is not upon the theory of subrogation, and we conclude that plaintiffs' remedy here is not concurrent with the remedy at law in favor of defendant bank.

However, the defendant company's liability is upon a constructive trust to which the statute of limitations will apply in an equity proceeding. And, although the statute of limitations will run against the constructive trust, it commences to run only from the time the cause of action arises; that is, when the party might bring a suit: Story, Equity Jurisprudence, § 1521a. The plaintiffs' cause of suit did not arise until judgment was obtained against the corporation and its insolvency disclosed. This is the holding of *Powell v. Oregonian Ry. Co.* 38 Fed. 187, and *Cherry v. Lamar*, 58 Ga. 541. Defendant cites a great many authorities upon the proposition that the statute of limitations has

run in defendant company's favor as to its liability for taking over the property of the bank, or receiving dividends upon its stock in the bank; but these cases are based upon the theory that plaintiffs are seeking to recover dividends wrongfully paid to stockholders, or for relief in the right of the corporation to recover from a stockholder upon his subscription to the stock, or upon his statutory liability. This proceeding is in the nature of a creditors' bill to reach the assets of an insolvent, fraudulently placed beyond the reach of legal process: *Railroad Co. v. Howard*, 74 U. S. (7 Wall.) 409 (19 L. Ed. 117); *Vance v. McNabb Coal, etc., Co.* 92 Tenn. 47 (20 S. W. 424). The transaction operates as a fraud upon creditors. Where a corporation transfers all its assets to a new corporation without paying or making provision for the payment of its debts, as we have already seen, the new company is, by virtue of the transaction, charged with notice, and, if creditors are delayed or defrauded thereby, it is a constructive fraud against them, and the creditor, after exhausting his remedy at law, may bring a creditors' suit to reach such assets. In such case the creditor has no standing to bring a creditors' suit until he has either a lien by judgment or attachment, or has exhausted his legal remedy; and it is held that the statute of limitations does not begin to run until plaintiff's cause of suit has arisen. It is so held in *Rose v. Dunklee*, 12 Colo. App. 403 (56 Pac. 347): "Statutes of limitations can never become operative, as we understand the law, until there is a cause of action to which they may be applied." Also Angell on Limitations, § 42, states: "The time limited * * is to be computed from the time at which a writ of entry accrues, and from the time at which a creditor is authorized first to commence a suit." In *Rose v. Dunklee*, 12 Colo. App. 403 (56 Pac. 347), it is held that fraud can be discovered only by the judgment and return of execution *nulla bona*, which discloses that the creditor is insolvent, viz., that there is no property from which the creditor can collect his debt. To the same effect is *Fogg v. St. Louis, H. & K. R. Co.* (C. C.), 17 Fed. 871, which is a parallel case.

In *Blackwell v. Hatch*, 13 Okl. 169 (73 Pac. 933), the statute provides that the limitation shall not begin to run until the discovery of the fraud, but it is held that, notwithstanding the discovery of the fraud before the return of execution, it does not start the statute running unless under the conditions then existing a creditor's cause of action accrues, and that the cause accrues on the return of the writ *nulla bona*. *Taylor v. Bowker*, 111 U. S. 110 (4 Sup. Ct. 397: 28 L. Ed. 368), in construing the Maine statute, which is similar to our own, holds that the statute begins to run from the return of the execution. To the same effect are the Maine cases: *Corey v. Greene*, 51 Me. 114; *Howe v. Whitney*, 66 Me. 17. The same is held in California in a suit to set aside an assignment for the benefit of the creditors as fraudulent: *Watkins v. Wilhoit* (Cal. Sup.), 35 Pac. 646; also, *Martel v. Somers*, 26 Tex. 551; *Gates v. Andrews*, 37 N. Y. 657 (97 Am. Dec. 764); *Washington v. Norwood*, 128 Ala. 383 (30 South. 405); *Taylor v. Bowker*, 111 U. S. 110 (4 Sup. Ct. 397: 28 L. Ed. 368); *Rounds v. Green*, 29 Minn. 139 (12 N. W. 454); *Rogers v. Brown*, 61 Mo. 187. Some of these cases are based on statutes providing that the limitation shall run from the discovery of the fraud, but this is the rule independent of the statute.

Therefore we conclude that the transfer by the defendant bank of all its assets to the defendant company without provision for payment of its debts was a constructive fraud against the plaintiffs; that by the very nature of the transaction and defendant company's relations to the defendant bank it took the assets with notice and *cum onere*, and in a suit by plaintiffs in the nature of a creditors' suit to reach the assets or their value in the hands of defendant company the limitation begins to run from the date of return of execution upon plaintiffs' judgments *nulla bona*. Therefore there was no error in the decision of the lower court, and the same is affirmed.

AFFIRMED.

Decided 20 August, 1907.

ON MOTION FOR REHEARING.

Opinion by MR. JUSTICE EAKIN.

7. By the motion for a rehearing defendant insists that, as plaintiffs are not seeking to be subrogated to the right of defendant bank, but are proceeding upon a liability in their own favor, they need not reduce their claims to judgments against the defendant bank, but may bring suit against the defendant company directly, and therefore the statute of limitations commenced to run from the time of the taking over the property of the defendant bank. In the opinion we have treated this transfer as a valid one between the defendant bank and defendant company, and only constructively fraudulent as to plaintiffs, because it deprived defendant bank of the means with which to pay its debts, and the remedy of the plaintiffs is not in the right of defendant bank, but in their own right, by reason of the equitable lien existing in favor of the creditors of the corporation bank. This is fully discussed in the opinion.

Counsel cite authorities in the motion to the effect that, where plaintiff's remedy is primary and direct, the creditor need not procure judgment and return of execution before suing the transferee, but may bring suit in the first instance against it. But these are cases in which the primary liability is created by statute, and are therefore not in point. We believe that *Case v. Beauregard*, 101 U. S. 688, 691 (25 L. Ed. 1004), states the rule correctly, viz.: "Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. * * Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien; and, when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts

a lien, or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference." But in the case at bar, although the creditor has an equitable lien, it is not specific, and he has no remedy upon it if the debtor has property subject to execution, and, as said in *Case v. Beauregard*, 101 U. S. 688, 691 (25 L. Ed. 1004): "In some cases, also, such an averment (of judgment and execution returned) is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand." And that is the case here. This equitable lien is not available to the creditor until he has disclosed that the debtor is insolvent; and, further, one of the first requisites in maintaining a creditors' bill is that the creditor has established his claim or debt by judgment at law: 12 Cyc. 9. This court has frequently held that the debt cannot be litigated in equity, but before the creditor can maintain such suit he must reduce his claim to judgment at law: *Fleischner v. Bank of McMinnville*, 36 Or. 553 (54 Pac. 884, 60 Pac. 603, 61 Pac. 345). This was not a debt for which the defendant company was primarily liable, nor may the plaintiffs look primarily to this lien. This right is upon a liability dependent upon whether the defendant bank is without property available to plaintiffs.

Upon the statement of facts in this complaint, plaintiffs had no standing without the allegation of judgment and execution returned *nulla bona* against defendant bank: *D. A. Tompkins Co. v. Catawba Mills* (C. C.), 82 Fed. 780. We understand that the case of *Taylor v. Bowker*, 111 U. S. 110 (4 Sup. Ct. 397: 28 L. Ed. 368), is directly in point upon this question. In that case, prior to 1867, the insurance company had wrongfully, as to creditors, made a division of a portion of its property among stockholders, and afterward surrendered its charter. Bowker obtained judgment on April 4, 1868, against the insurance company upon a suit commenced prior to the surrender of the charter. Execution was returned *nulla bona* July 8, 1868, and on April 11, 1874, being more than six years after the judgment, but less than six years from the return of execution, Bowker commenced this

suit to reach property in the hands of the defendants, received by them prior to the surrender of the insurance company's charter; and it was held that judgment and execution were essential to Bowker's remedy against defendants to reach equitable assets, regardless of the statute, which dispensed with a return of the execution. Although the question was not raised in *Bartlett v. Drew*, 57 N. Y. 587, cited in the opinion, it is held that, before there is a remedy to follow the equitable lien of a creditor upon the assets of a corporation, the legal remedy must be exhausted. In *Christensen v. Quintard*, 36 Hun (N. Y.), 334, the bridge company distributed to its stockholders, including Quintard, a large amount of mortgage bonds without consideration. Plaintiff recovered judgment for his debt against the defendant company, and had execution returned *nulla bona*, and he brought this suit against defendant to recover the value of said bonds received by him. Defendant insisted on the statute of limitations, claiming that, if the debtor was barred, defendant also was barred. The court holds that plaintiff's right does not depend upon the right of the bridge company to recover from the defendant, but upon his own right to enforce the creditor's equitable lien upon the assets of the corporation, and that his remedy does not arise, or the statute begin to run, until judgment and return of execution, citing *Bartlett v. Drew*, 57 N. Y. 587; *Scovill v. Thayer*, 105 U. S. 143 (26 L. Ed. 968); and *Taylor v. Bowker*, 111 U. S. 110 (4 Sup. Ct. 397; 28 L. Ed. 368).

The foundation of the proceeding by a creditor to follow the property of an insolvent corporation in the hands of a third party is not identical with such a proceeding to reach property of an insolvent individual fraudulently conveyed. The authorities clearly maintain a distinction. The quotation in the opinion from 10 Cyc. 1265, which was prepared by Seymour D. Thompson, author of *Thompson on Corporations*, we think states the law correctly as gathered from the cases. In *Clapp v. Peterson*, 104 Ill. 26, 31, the corporation had bought in its own stock, giving in exchange therefor certain city lots, and the creditor, after the judgment obtained and execution returned *nulla bona*,

brought suit against the former stockholder to follow the property so conveyed by the corporation. The court say: "We see nothing to show that the transaction in the present case was not in good faith, that there was any element of fraud about it, or that there was anything in the apparent condition of the company to interfere with the making of the exchange that was had. It is only as injuriously affecting the interests of creditors, we think, that the transaction can be questioned, and it is in that view that it must be considered and passed upon. In *Sanger v. Upton*, 91 U. S. 60 (23 L. Ed. 220), it is laid down: 'The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims.'" Therefore we conclude that although the plaintiffs are not suing in the right of the defendant bank, but in their own right to follow the property of a corporation under this equitable lien, yet they cannot pursue that remedy until the claims have been reduced to judgment and the insolvency of the defendant bank is disclosed; and the statute of limitations will run not from the time of the discovery by the plaintiffs of the transfer of the property, but from the time that they are in a position to institute the suit, viz., from the date of the return of the execution *nulla bona*.

Motion for rehearing is denied.

AFFIRMED: REHEARING DENIED.

Argued 7 May, decided 16 July, 1907.

HAWLEY v. SUMPTER RAILWAY CO.

90 Pacific 1106.

RAILROADS—LIABILITY FOR FIRES RESULTING FROM DEFECTIVE APPLIANCES OR NEGLIGENT OPERATION.

1. To charge a railroad company for injury resulting from a fire caused by sparks from a locomotive that was either improperly constructed or negligently operated, the charge must be proved as laid.

RAILROADS—FIRE FROM DEBRIS ON RIGHT OF WAY.

2. Where a claim against a railroad company is made for damages resulting from a fire originating in combustible material accumulated on the right of way, it is only necessary to show that the fire started as claimed, and the company will be liable, though it was supplied with the best of locomotives and the most approved appliances for preventing the emission of sparks, and though the same were operated by the most skilled engineers.

RAILROADS—FIRES—EVIDENCE OF NEGLIGENCE.

3. The evidence of plaintiff makes at least a *prima facie* case of negligence on the part of the defendant railroad company in allowing combustible material to accumulate on its right of way.

SAME.

4. The evidence of plaintiff justifies an inference that the fire in question started from sparks dropped by one of defendant's locomotives into combustible material negligently allowed to accumulate on defendant's right of way, and escaped therefrom to plaintiff's property, destroying it.

RAILROADS—EVIDENCE OF FIRES FROM OTHER ENGINES.

5. In actions for damages resulting from fires caused by passing engines, it may be shown that other fires were caused by locomotives of defendant at various times in the same vicinity.

RAILROADS—FIRES BY ENGINES—CONTRIBUTORY NEGLIGENCE.

6. One who is in a position to prevent any danger from fire set by sparks from a locomotive without incurring unusual danger, and who makes no effort to do so, is guilty of negligence precluding a recovery.

CONTRIBUTORY NEGLIGENCE OF SERVANT—WHEN IMPUTABLE TO MASTER.

7. An employee, engaged with reference to the care or management of any property threatened with destruction by fire set by sparks from a locomotive, must make reasonable effort to avert the injury, and the neglect of the employee is the neglect of the owner precluding a recovery.

RAILROADS—EVIDENCE OF FIRES NOT CONNECTED WITH DEFENDANT.

8. In an action against a railway company for a fire set by sparks from a locomotive, it is error to permit a witness to testify that he had seen fires along the company's right of way, unless the testimony connects the fires with the operation of the road by the company.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. COMMISSIONER SLATER.

This is an action by W. R. Hawley against the Sumpter Valley Railway Co., in which plaintiff sues to recover in damages the value of a quantity of hay and a shed in which it was stored, which were destroyed by fire on August 31, 1905, on his farm. It is alleged, in effect, that about 10 o'clock in the forenoon of that day three of defendant's trains going west passed along its road, the right of way of which abutted upon plaintiff's premises, where he had his hay stored; that by reason of improperly con-

structed engines, carelessly and negligently operated and managed by defendant's employees, flaming sparks and coals were emitted therefrom, which lodged in and ignited a quantity of grass, leaves, brush, logs and other rubbish, which defendant had carelessly allowed to accumulate on its right of way; that the fire spread from the right of way to plaintiff's hay, destroying it and his shed. There was a general denial of the complaint, and also an affirmative defense, to the effect that defendant's engines were at that time in charge of skillful, careful and competent employees, and that the engines were properly constructed and possessed suitable appliances for arresting sparks and cinders, and that none of the engines passing plaintiff's premises that morning were overworked or oversteamed; that the fire was not caused by its engines, and did not start upon its right of way, but that it started on plaintiff's premises, and was caused by parties unknown to it, not defendant's employees; and that the fire, after having started without defendant's fault, spread to its property. By his reply, plaintiff denies the affirmative matter in the answer. The trial resulted in a verdict for plaintiff, upon which judgment was entered, and from which defendant appeals. There was a motion by defendant for a nonsuit at the close of plaintiff's case, as well as one for a directed verdict in its favor at the close of its case, which motions were overruled. Assignments of error are based thereon, as well as upon exceptions to the admission of testimony and to instructions of the court.

REVERSED.

For appellant there was a brief over the name of *John L. Rand*, with an oral argument by *Mr. Vernor Wayne Tomlinson*.

For respondent there was a brief over the names of *Hart & Smith* and *C. H. McColloch*, with an oral argument by *Mr. McColloch*.

Opinion by MR. COMMISSIONER SLATER.

No direct testimony was offered by plaintiff tending to show any defective construction or want of repair of any of defendant's engines, or of any careless or negligent operation of any of

them on the day on which his property was destroyed, nor was he able to identify any particular engine, which he claimed set the fire, further than to show by number the three particular engines which passed his premises in the forenoon of August 31, 1905, which three engines did practically all of the hauling on that part of defendant's road in the vicinity of plaintiff's farm. But it was also shown that all of defendant's engines were practically of the same construction as to fire boxes and devices for arresting sparks. The evidence on the part of plaintiff tends to show that on the morning of August 31, 1905, between the hours of 8 and 9 o'clock, there was no fire about his premises or his haystacks; that between the hours of 9:30 and 10:20 o'clock on that morning defendant ran its three trains of cars going west over its road, where the same passes over and across plaintiff's premises and adjacent to his hay shed, where he had 42 tons of loose hay and 12 tons of baled hay stored; that the distance, according to one witness, from the hay shed to the track, is from 50 to 100 yards; that defendant had allowed to accumulate and remain on its right of way, where it is claimed the fire originated, a quantity of dry grass, brush, logs and ends of ties; that all of the engines of defendant used over said road were practically of the same construction as to fire boxes and spark arresters; that defendant's roadbed for some distance before reaching the place opposite where the hay was stored when coming from the east and going west has a pretty good upgrade, and that its engines, when passing this particular place, were in the habit of emitting a quantity of flaming sparks and cinders. One witness in describing that said: "There was a large quantity, a whole trail, flying back from the smokestack," and that at least twice during the months of July and August of that year, and in the vicinity of plaintiff's premises, fires were discovered on defendant's right of way soon or immediately after the passing of trains.

There is no direct evidence in the record as to how or when the fire in question originated, but one Smith, who had been hauling wood from plaintiff's premises to the town of Sumpter,

testifies that between the hours of 12 and 1 o'clock of that day, as he came from Sumpter along the public road, and was on an eminence opposite the haystack, he saw smoke coming from an old log on defendant's right of way, and between plaintiff's haystacks and the track. One end of this log, according to his testimony, was probably partly under plaintiff's fence. Witness was about 250 yards from the track opposite the hay, but could see that no fire was then on plaintiff's land between the right of way and his haystacks, and there was no fire at the haystacks. He testifies that he afterwards put up his team and loaded his wagon again with wood, but about 3 o'clock in the afternoon of that day he went down to the place where he had seen the fire and saw that plaintiff's hay had been consumed, and he also saw the log burning from which he had observed smoke coming earlier in the day. There was a burned track 20 to 40 feet wide leading from the right of way up to the place where the shed and haystacks had been, but were then destroyed, and it appeared to this witness that the fire had traveled from the right of way to the haystacks. The fire had also extended upon and along defendant's right of way some distance to a bridge or culvert, which was burning. Alexander Stedman, another witness, also testified in plaintiff's behalf that he passed along by plaintiff's premises about 1 o'clock of that day and noticed that the right of way was afire for a distance of 150 to 200 yards up and down the track, and the fire was burning in some logs and old tie ends that had been piled upon the right of way; that the end of the haystack had just caught on fire, and quite a strip of land from the right of way to the stack had been burned over; that the fire was moving from the right of way toward the stacks. Both of these witnesses testify that at the time they were at the place the fire was burning the wind was blowing from the right of way toward the stacks.

Upon this state of the testimony defendant urges its right to a nonsuit. The gist of plaintiff's cause of action is negligence of the defendant in running upon its road engines improperly constructed, and in a careless and negligent manner, by reason

of which sparks of fire and flaming coals were thrown out and upon grass, rubbish and logs carelessly left and allowed to accumulate upon its right of way, setting fire thereto, which spread and destroyed plaintiff's property. The negligence here alleged is of a double nature: (1) In the use of improperly constructed engines or the careless and negligent operation of them, which caused the fire that consumed plaintiff's property; and (2) in allowing brush, rubbish and logs to accumulate and remain upon its right of way, which became ignited by sparks and coals of fire from defendant's engines.

1. In the former case, to make defendant liable, plaintiff must prove negligence on its part in using defective engines, or negligence in the operation of them, by which the fire was caused.

2. But in the latter case, it is sufficient to charge the defendant, if the evidence shows that it allowed rubbish to accumulate and remain upon its right of way, which became ignited by sparks or coals coming from its engines, although defendant may have been supplied with the best of engines, and the most approved appliances for preventing the emission of sparks, and although its engines may have been operated by the most skilled engineers. If a fire, the origin of which has been traced to defendant's engines, occurs in consequence of a negligent failure on the part of defendant to keep its right of way reasonably clear of dangerous combustible material, and damage thereby ensues to property of another, it would be liable: *Richmond v. McNeill*, 31 Or. 342 (49 Pac. 879).

3. The evidence in the case at bar tends to show that defendant's right of way at the time of the fire was incumbered with a considerable amount of combustible material, consisting of dry grass, brush, tie ends and logs, and that the fire when first observed was in an old log, which had evidently been there for some time, for defendant's counsel, when cross-examining plaintiff's witness, Smith, asked this question, "Don't you know that the log was afire one year before that time, and was not afire upon the 31st day of August last? Don't you know that?" To this question witness answered, "No, sir." Then immediately

thereafter counsel asked him this question: "And shown on the ground to be a fact." The form of the interrogatories would appear to be an admission on part of defendant that the log in question had been on the right of way for the past year. There was also some evidence that the fire was observed burning in the same vicinity in some old tie ends, which had evidently been piled there by defendant's employees. In this, we think, is ample evidence to make a *prima facie* case, at least, of negligence on part of the defendant in keeping its right of way reasonably free of combustible material.

4. Defendant contends, however, that there is no evidence from which an inference may be drawn that its engines started the fire in question, and evidence that the fire on the right of way was first observed between two and two and one-half hours after the passing of defendant's last train is too remote to create such an inference. It has been held by many courts that fire discovered upon the right of way soon or immediately after the passing of an engine, where it is also shown that it cannot be reasonably inferred that the fire was caused in some other manner, creates an inference that the fire was caused by sparks of fire from the passing engine, and this is the rule of this court, as stated in the case of *Richmond v. McNeill*, 31 Or. 342 (49 Pac. 879). At page 361 (48 Pac. p. 884) of the opinion, Mr. Chief Justice MOORE says: "Such a rule, it would seem upon principle, ought to be enforced, for, having been negligent in permitting the accumulation of dry grass and other inflammable material at exposed places, it is reasonable to infer from the fact that the fire was started therein that it was caused by a spark given off by the engine." But the fact that the smoldering fire was not observed by any one for two or two and one-half hours after the passing of defendant's last engine does not necessarily destroy that inference, when we take into consideration the surrounding circumstances shown here, that the locality is remote and the country sparsely settled in that neighborhood, and that there may have been none present to observe the beginning of the fire, and the character of the testimony given by the

witness who first saw the fire. The evidence is that witness Smith, between 12 and 1 o'clock of that day, while passing along the public highway, and on an eminence about 250 yards distant, saw smoke coming from an old log, which, by other testimony, was rotten and on fire and on the right of way. It was not the beginning or the origin of the fire that this witness observed, but smoke from a log which, under the facts shown, may have been slumbering with fire for hours before being communicated to the surrounding territory. It is quite true that the strength of the inference to be drawn from such testimony diminishes with the increase of time that the fire may be discovered after the passing of the engines, and the inference in this case may not be strong, but it is some evidence, and we think at least creates a probability that defendant's engines caused the fire.

5. Plaintiff does not, however, depend solely upon this inference to make his case. In addition he has shown by competent evidence that defendant's engines, when passing along this particular place, which has an upgrade, emitted quantities of sparks, and that other fires were discovered in July and August of that year on defendant's right of way where it crossed his premises and soon after the passing of an engine. This evidence, taken together with the inference to be drawn from the discovery of the fire on the right of way in combustible material negligently allowed to accumulate, although discovered upon the lapse of considerable time after the passing of the engine, strengthens the possibility that it was caused by the engine, and creates a reasonable probability that such was the fact. In the case of *Dunning v. Maine Cent. R. Co.* 91 Me. 87 (39 Atl. 352; 64 Am. St. Rep. 208), the court say: "We think that when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, other fires caused by defendant's locomotives at about the same time and in the same vicinity may be given in evidence for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals. It is admissible as tending to prove the possibility, and a consequent

probability, that some locomotive caused the fire'—language from *Grand Trunk Ry. v. Richardson*, 91 U. S. 464 (23 L. Ed. 356)—which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive, as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability and then to satisfactory proof. A simple enumeration of some of the authorities which sustain these views may be useful: *Sheldon v. Hudson River R. Co.* 14 N. Y. 218 (67 Am. Dec. 155); *Field v. New York Cent. R. Co.* 32 N. Y. 339; *Diamond v. North Pac. Ry. Co.* 6 Mont. 580 (13 Pac. 367; 29 Am. & Eng. R. Cas. 117); *Piggott v. Ea.* 3 M. G. & S. 229; *Koontz v. Oregon Ry. & Nav. Co.* 20 Or. 3 (23 Pac. 820; 43 Am. & Eng. R. Cas. 11); *Chicago, St. P., M. & O. Ry. Co. v. Gilbert*, 52 Fed. 711 (3 C. C. A. 264); *Campbell v. Missouri Pac. Ry. Co.* 121 Mo. 340 (25 S. W. 936; 25 L. R. A. 175; 42 Am. St. Rep. 530); *Smith v. Old Colony, etc., R. Co.* 10 R. I. 22; *Annapolis, etc., R. Co. v. Gantt*, 39 Md. 124; 1 Thompson, Negligence, 163."

6. It is also urged by defendant that the testimony of plaintiff shows that he failed to exercise the proper degree of care and diligence to protect his property from the fire in question after its origin, if it did originate on the right of way of defendant. This contention is based on the claim that the testimony shows that witness Paul Amel, as plaintiff's lessee, was directly in possession of the field in which the fire occurred, and that Amel's hired man was there on the premises during the whole time in which it was claimed the fire was set and destroyed the hay. Amel, on cross-examination, however, swears he was not in charge of the ranch, but was milking some cows there;

that he left the premises in the morning at about 6 o'clock and did not return until between 3 and 5 o'clock in the afternoon of the same day; that he left his hired man, Roy Nordyke, on the place, but he does not pretend to know where Nordyke was during the day, nor what Nordyke saw or did that day. If the plaintiff was in a position to have prevented any damage from fire to his property without incurring unusual danger, but made no effort to do so, it was negligence on his part, and precluded his right of recovery: *Eaton v. Oregon Ry. & Nav. Co.* 19 Or. 391 (24 Pac. 415).

7. And in the absence of the principal, it is the duty of the agent or employee, engaged with reference to the care or management of any property that is threatened with destruction by fire caused by neglect of another, to make reasonable effort to avert the injury and the neglect of the agent or employee in this respect is the failure of the principal: *Railway Co. v. Hecht*, 38 Ark. 357, cited with approval in *Richmond v. McNeill*, 31 Or. at p. 350 (49 Pac. p. 881). But in the case at bar the evidence referred to is not sufficient, in our opinion, to show that either Amel or Nordyke was charged with any duty in reference to the care or custody of this property, as the agent or employee of the plaintiff, nor does it show that either of them, if such duty was shown to have devolved upon him, was in a position to have averted the injury. Amel was away from the farm during most of the day and while the fire occurred, and where Nordyke was is not shown: at least it is not shown that he saw the fire in time to have arrested it with reasonable effort and without danger to himself. Jesse Smith, another witness for plaintiff, who between 1 and 12 o'clock of that day first saw smoke coming from the log on the right of way, was at the time engaged as plaintiff's employee in hauling wood from plaintiff's premises, but his employment evidently had no reference to the care and management of plaintiff's meadow land or hay, and so far as the evidence discloses no duty rested on him to leave his special employment, care and duty to look after the general welfare of plaintiff's property. For these reasons the court properly over-

ruled the motion for nonsuit by the defendant, and for substantially the same reasons the court was bound to overrule defendant's motion for a directed verdict. Upon this latter assignment of error counsel for defendant urges that evidence was offered by it tending to show that its engines were in proper condition, and skillfully handled, and that it had thereby rebutted the inference of negligence deducible from plaintiff's case. However this may be, the record does not contain any of defendant's evidence, and if it did, it would not, in our opinion, be a sufficient answer to plaintiff's case as we have considered it.

8. But we find it necessary to reverse this case and remand it for a new trial for error committed by the court in admitting incompetent testimony. Witness Graves was permitted to testify over defendant's objection that he had seen other fires on defendant's right of way in the month of July, and a short distance above plaintiff's premises, but he failed to state any other circumstances tending to connect the origin of the fire with defendant's engines; and likewise J. L. Yantis was permitted to testify over defendant's objections that he had seen a number of fires along defendant's right of way near his farm, which is about four miles from plaintiff's farm, but no other facts or circumstances were given by him when testifying tending to show how any of these fires originated, or that defendant was in any way responsible for them. Evidence of other fires upon defendant's right of way is admissible to strengthen the inference that the fire in question originated from the cause alleged, only when it is shown in connection therewith that at or about the time of the occurrence the defendant's locomotives threw sparks and kindled fires upon that part of its highway where the fire complained of occurred; or that an engine had passed soon or just previous to the origin of the fire, or some other fact tending in some degree to connect the occurrence of the fire with the operation of the road by defendant: 1 Jones, Evidence, §§ 163, 164; *Koontz v. Oregon Ry. & Nav. Co.* 20 Or. 3 (23 Pac. 820); *Richmond v. McNeill*, 31 Or. 342 (49 Pac. 879); *Norwich Ins. Co. v. Oregon Railroad Co.* 46 Or. 123 (78 Pac. 1025); *Manchester*

Assur. Co. v. Oregon Railroad Co. 46 Or. 162 (79 Pac. 60: 69 L. R. A. 475).

The plaintiff having failed to offer in connection with the testimony of these two witnesses, to which objection was made, any testimony tending to connect, either directly or remotely, any of the fires mentioned by them with the operation of the road by defendant, such testimony was not admissible. Under these circumstances it will not be necessary to examine any other of the assigned errors, as they will no doubt be eliminated upon a retrial.

The judgment should be reversed, and the cause remanded for a new trial.

REVERSED.

Argued 4 April, decided 21 May, 1907.

ACME DAIRY CO. v. ASTORIA.

90 Pac. 153.

CONSTITUTIONAL LAW—SELF-EXECUTING PROVISIONS.

1. A provision of the fundamental law is self-executing when it prescribes a rule, the application of which puts into operation the constitutional provision.

The Constitution of Oregon is self-executing in the particulars prescribed in Art. IV, Sec. 1a, which is the initiative amendment relating to local and special municipal legislation.

CONSTITUTIONAL CONTROL OF LOCAL AND SPECIAL LEGISLATION.

2. Under Const. Or. Art. IV, § 1a, the right of prescribing rules for the application of the initiative and referendum rights is not conferred upon cities or towns except as to municipal legislation, under the rule that the inclusion of one power excludes others.

LOCAL AND SPECIAL LEGISLATION DEFINED.

3. The words "local" and "special," relating to municipal legislation, used in Const. Or. Art. IV, § 1a, which is the initiative amendment, are synonymous terms and mean enactments intended to affect only certain persons or things, or to operate in specified localities only.

"MUNICIPALITY" AND "DISTRICT"—NATURE OF CITY CHARTER.

4. The terms "municipality" and "district," used in Const. Or. Art. IV, § 1a, reserving the initiative and referendum powers to the legal voters of municipalities and districts, are of the same import, meaning a district created from a designated part of the state and organized to promote those conveniences of the public at large which are inherently local and special.

CONSTITUTION—CREATION AND AMENDMENT OF MUNICIPAL CHARTERS.

5. Const. Or. Art. XI, § 2, as amended in 1906, prohibits the legislature from enacting, amending, or repealing any municipal charters, and grants to the legal voters of every city and town the power to enact and amend their charter, but does not grant the right of repeal.

EXTENT OF INITIATIVE POWER CONFERRED ON MUNICIPAL CORPORATIONS.

6. The authority to provide the manner of exercising the initiative power as to municipal legislation, reserved to the legal voters of municipalities by the amendment of 1906, Section 1a, to Const. Or. Art. IV, extends to the manner of amending the charters of cities as well as their ordinances.

From Clatsop: THOMAS A. McBRIDE, Judge.

Statement by Mr. JUSTICE MOORE.

This is a suit by the Acme Dairy Co. against the City of Astoria and another to enjoin the execution of a contract, to set aside a special assessment and to have an ordinance declared void. The facts are that the Common Council of Astoria enacted an ordinance October 17, 1906, prescribing the manner of invoking the initiative power reserved to the people, in pursuance of which petitions were presented to the proper officer, praying that Section 75 of the city charter might be so amended as to eliminate therefrom a clause providing that no special assessment levied on premises for any one improvement should exceed 75 per cent of the value of the land as assessed for municipal taxation in the last preceding tax roll of Clatsop County, Oregon: Sp. Laws Or. 1901, pp. 783, 785. Notices were given of the proposed amendment and that a vote thereon would be taken at the general city election December 12, 1906, at which a majority of all the ballots cast, as appeared from a canvass thereof, were polled in favor of the measure, whereupon the mayor issued a proclamation declaring the amendment adopted and stating that it would be in effect January 1, 1907. An ordinance was thereafter enacted, prescribing the time for and the manner of improving a street for a specified distance and imposing the cost thereof upon the real property benefited thereby, upon which highway plaintiff's premises are situated. The contract for the improvement of the street was let to the defendant August Hillstrom. As the special assessment levied upon plaintiff's property exceeds the sum originally limited by the charter, this suit was instituted on the assumption that the amendment had not been legally adopted. A demurrer to the complaint on the ground that it did not state facts sufficient to warrant the relief

sought having been sustained, the suit was dismissed, and plaintiff appeals.

The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

AFFIRMED.

For appellant there was a brief over the name of *Noland & Smith*.

For respondent there was a brief over the name of *Charles Henry Abercrombie*, City Attorney.

Opinion by MR. JUSTICE MOORE.

The question to be considered is whether or not the Common Council of Astoria possessed power to prescribe the manner of amending the city charter. Article IV of the state constitution was amended June 4, 1906, by inserting therein Section 1a as follows:

"The referendum may be demanded by the people against one or more items, sections or parts of an act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. No more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town."

It is argued by plaintiff's counsel that the right so retained by the legal voters of an incorporated city or town to provide for the manner of exercising the initiative and referendum powers is expressly limited by the amendment to the enacting or repealing of ordinances, etc.; that an amendment of a charter can now be secured only by the legal voters, whose acts in these

respects are not within the class designated as municipal legislation; that the right reserved by the constitutional amendment is not self-executing, and cannot be carried into effect in the absence of a general statute prescribing the mode of its exercise, and hence errors were committed in sustaining the demurrer and in dismissing the suit.

1. In construing a provision of a written constitution, the primary inquiry is to ascertain the intent of the framers and of the people who adopted the clause under consideration, to determine which, effect should be given to all the words used (*Rugh v. Ottenheimer*, 6 Or. 231: 25 Am. Rep. 513), disregarding technical rules and adopting a mean between a strict and a liberal construction: 8 Cyc. 730; 5 Cur. Law, 622; 6 Am. & Eng. Enc. Law (2 ed.), 921. A section of the fundamental law is self-executing when it prescribes a rule, the application of which puts into operation the constitutional provision: *Cooley*, Const. Lim. (5 ed.) 100; 6 Am. & Eng. Enc. Law (2 ed.), 912. The amendment quoted having expressly authorized cities and towns to provide for the manner of exercising the initiative and referendum powers as to their municipal legislation, the provision is therefore self-executing in respect to the class of enactments specified.

2. This being so, the decision herein much hinge on the meaning of the phrase "municipal legislation" as understood by the persons mentioned. To understand the signification of these words requires an interpretation of the term "local and special legislation," the right to formulate rules in relation to which is impliedly denied to cities and towns, on the principle that the expression of one thing is the exclusion of another.

3. The qualifying words "local" and "special" are synonymous (*Smith v. Grayson County*, 18 Tex. Civ. App. 153: 44 S. W. 921), and, in the sense in which they are used, mean any enactment that is plainly intended to affect a particular person or thing or to be in effect in some specified locality only: *Ladd v. Holmes*, 40 Or. 167 (66 Pac. 714: 91 Am. St. Rep. 457).

4. The words "municipality" and "district" as used in the clause of the amendment adverted to are evidently expressions of

equivalent import, for a district legally created from a designated part of the state and organized to promote the convenience of the public at large is a municipal corporation: *Cook v. Port of Portland*, 20 Or. 580 (27 Pac. 263; 13 L. R. A. 533). The authority of such a corporation has been heretofore derived from an act of the legislative assembly creating it, and, as such statute is applicable to and enforceable in a part of the state only, it is a local or special law: *Maxwell v. Tillamook County*, 20 Or. 495 (26 Pac. 803); *Ellis v. Frazier*, 38 Or. 462 (63 Pac. 642; 53 L. R. A. 454); *Baker County v. Benson*, 40 Or. 207 (66 Pac. 815). Prior to June 4, 1906, when the amendment referred to was adopted, the legal voters of a corporation of the kind last mentioned could exercise no legislative functions and the local and special laws operative in the district embraced in its territory were enacted by the legislative assembly. As some of these organized districts were in existence when the amendment was adopted, we believe a fair construction of the words "local" and "special," as used by the framers of this clause of the organic law, limit their application to such municipal corporations as are described in the case of *Cook v. Port of Portland*, 20 Or. 580 (13 L. R. A. 533; 27 Pac. 263).

5. Section 2 of Article XI of the fundamental law of the state originally contained the following clause:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes."

This provision was amended June 4, 1906, so as to read as follows:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

It will thus be seen that this change in the organic law deprives the legislative assembly of all authority to enact, amend or repeal any charter of a city or town, the legal voters of which

reserve to themselves the exercise of all such power, except the right of repeal.

6. The amendment last referred to having been adopted at the same time as the section first hereinbefore quoted, the parts of their provisions that relate to the same subject-matter ought to be construed together, and, so considering them, we believe it was the intention of the framers of Section 1a of Article IV of the constitution, and also of the people who ratified it, to vest an incorporated city or town with authority to provide the manner of exercising the initiative and referendum powers as to amendments of a charter, which change is reasonably within the generic term of "municipal legislation." It is true that cities were originally incorporated by special laws, but, as other municipal corporations were created in the same manner, and were in existence when the organic law was amended, we do not think the terms "local" and "special," as used in Section 1a of Article IV of the constitution to qualify the word "legislation," limit the authority of a city or town to prescribing the manner of exercising the initiative and referendum powers as to the enactment or repeal of ordinances only; for, if such restriction had been intended, it would not have been difficult so to have framed the amendment. The legislative assembly of this state on February 25, 1907, passed an act prescribing the manner of invoking the initiative and referendum powers by the legal voters of an incorporated city or town, Section 10 of which makes the statute effective only when the municipality has not made and does not make any conflicting provisions: Gen. Laws 1907, p. 398. It would thus appear that a majority of the members of the legislative assembly evidently thought an incorporated city or town could provide for the manner of exercising the powers reserved to the legal voters of a municipality; and, though such determination is not binding upon a court, it is at least a persuasive argument and tends to confirm the conclusion we have reached.

Believing that the Common Council of Astoria were empowered to provide by ordinance for the manner of amending the city charter, it follows that the decree should be affirmed, and it is so ordered.

AFFIRMED.

Argued 5 February, decided 19 March, 1907.

RENSHAW v. LANE COUNTY COURT.

89 Pac. 147.

**MUNICIPAL CORPORATIONS—EFFECT OF LOCAL OPTION ON POWER TO
REGULATE SALES OF INTOXICATING LIQUORS—IMPLIED AMENDMENT.**

1. The general local option law enacted by popular vote in 1904 did not impliedly amend the existing charters of any cities, and charters remained unaffected until local option was put into force in the communities in which they were situated by county courts pursuant to the results of elections.

AMENDMENT—EFFECT OF RE-ENACTING FORMER STATUTE.

2. A re-enactment of a former statute is considered as a continuation of the language so repeated and not a new enactment as of that date, and the same rule applies to the use of terms synonymous with those in the prior statute.

In the statute of 1905, reincorporating the City of Eugene and repealing all acts and parts of acts in conflict therewith, the amendment empowering the common council to license, tax, regulate or prohibit bar-rooms, drinking shops * * and places where spirituous, malt, vinous or intoxicating liquors are sold (Sp. Laws, 1905, pp. 243, 250, § 48, subd. 18), did not amend the old charter respecting the power to prohibit, the word "intoxicating" used in the new charter being a synonym of the kinds of liquor specified in the old charter.

From Lane: LAWRENCE T. HARRIS, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by William Renshaw and his partner against G. R. Chrisman, as county judge of Lane County, and the other members of the county court thereof, to restrain them from making an order prohibiting the sale of intoxicating liquors in the City of Eugene, and also to have the election held in the county, to determine whether or not such sales should be prohibited therein, declared invalid so far as the votes cast affect the city. The complaint states that the plaintiffs are engaged in selling alcoholic liquors at retail in Eugene, and in April, 1906, by virtue of an ordinance which was in force pursuant to a charter granted February 18, 1905, they secured from the city a license to conduct their business therein for the term of one year, paying therefor the sum of \$500; that, relying upon the faith of the authority conferred, they expended in furnishing a building, and in procuring a stock of liquors, more than \$3,000; that a purported petition having been presented to the defend-

ants, they made a pretended order that an election should be held June 4, 1906, to determine whether or not the sale of intoxicating liquors should be prohibited in the entire county, including the limits of the city; that, the election having been held, the ballots cast thereat were canvassed, and an abstract thereof made, which purports to show that there were polled 2,276 votes in favor of prohibition and 2,048 against the measure; and that the defendants, as the County Court of Lane County, threaten and will, unless restrained, make an order declaring the pretended result of the election and prohibiting the sale of intoxicating liquors in the entire county, to plaintiffs' irreparable injury. A demurrer to the complaint, on the ground that it did not state facts sufficient to warrant equitable intervention, having been sustained, the suit was dismissed, and the plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the names of *Woodcock & Potter* and *Thompson & Hardy*, with oral arguments by *Mr. Absalom Cornelius Woodcock* and *Mr. Charles Albert Hardy*.

For respondents there was a brief over the names of *George M. Brown*, District Attorney, and *John Monroe Williams*, with an oral argument by *Mr. Williams*.

Mr. JUSTICE MOORE delivered the opinion of the court.

The transcript shows that the charter of the City of Eugene, passed in February, 1893, empowered the common council as follows:

"To license, tax, regulate or prohibit barrooms, drinking shops, tipping houses, billiard rooms, dancehouses, and all places where spirituous, malt or vinous liquors are sold": Laws 1893, pp. 564, 574, § 48, subd. 18.

A local option law, initiated by petitions, pursuant to an amendment of the constitution (1 B. & C. Comp. p. 72), was enacted by vote of the citizens of the state at an election held June 6, 1904. Laws 1905, pp. 41, 50. This act prescribes the manner of prohibiting the sales of intoxicating liquors in any county or part thereof, including an incorporated town or city, by a

majority vote of the qualified electors in favor of the measure. An act was passed by the legislative assembly in February, 1905, reincorporating the City of Eugene, and repealing all acts and parts of acts in conflict therewith: Sp. Laws 1905, pp. 243, 279. The new charter was adopted to enable the city to acquire a system of waterworks, to secure a plant for manufacturing gas or generating electricity for illumination, and to sell municipal bonds to raise money therefor. The amendment empowered the common council, *inter alia*, as follows:

"To license, tax, regulate or prohibit barrooms, drinking shops, tippling houses, billiard rooms, dancehouses and all places where spirituous, malt, vinous or intoxicating liquors are sold": Sp. Laws 1905, pp. 243, 252, § 48, subd. 18.

1. It is contended by plaintiffs' counsel that the passage of the local option law referred to so amended the old charter of Eugene as to take from the common council the power to prohibit the sale of intoxicating liquors, and vested the authority in the electors of the county or in the voters who resided in a part thereof, which might include the limits of the city; that when the new charter was passed in February, 1905, restoring to the council the power of which they had been divested in the manner indicated, the enactment was the latest expression of the legislative will, and necessarily repealed the local option law, so far as it had been applicable to Eugene, thereby depriving the electors of authority to prohibit the sale of intoxicating liquors within the city; and, this being so, the vote in favor of prohibition as cast in the entire county, improperly including Eugene, was ineffectual for that purpose within the limits of the city, and for these reasons errors were committed in dismissing the suit, and in not granting the injunction invoked.

An examination of the local option law convinces us that, though the enactment is general, and became operative in the entire state at the time of its passage, it did not effect any material change in the existing municipal charters which authorized the licensing or permitted the prohibition of the sale of intoxicating liquors in an incorporated town or city, until its

provisions were made specially applicable to a particular locality by a majority vote of the electors thereof in favor of prohibition. The law thus enacted by the people should be read in connection with the charters mentioned, and is, in effect, a declaration that an exercise of the powers granted by the legislative assembly to incorporated towns and cities, as evidenced by municipal charters, to issue or to deny licenses for the sale of intoxicating liquors, might be continued until changed in the manner prescribed. The law adverted to practically ingrafted upon the charter of every city or incorporated town in the state an amendment limiting the powers granted, as indicated by the quoted words following: The common council (or other legislative body) shall have power, within the municipal limits, "until deprived thereof in the manner prescribed in the local option law, enacted by the people June 6, 1904," to license, tax, regulate or prohibit, etc.: *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642); *Fouts v. Hood River*, 46 Or. 492 (81 Pac. 370; 1 L. R. A., N. S., 483); *Baxter v. State*, 49 Or. 356 (88 Pac. 677). Such being the effect of the local option law, it did not take from the common council of Eugene the power which they acquired under the charter, until they were deprived thereof by a majority vote in favor of prohibition by the electors of Lane County, which territory included the limits of the city.

2. Nor do we think the act of February, 1905, amended the old charter in respect to the power mentioned, for an examination of the clauses hereinbefore set out will show that they are identical, except that in the new charter the word "intoxicating" is inserted. The beverages mentioned in the old charter are "spirituuous, malt or vinous," and as the qualifying word "intoxicating," used in the new charter, is a synonym of the kinds of liquor specified in the old, no material change was made in or force added to that clause by the alleged amendment. The new charter, so far as it related to the grant of power to license or to prohibit the sale of intoxicating liquors, was not a new statement of the authority conferred, but a repetition of the earlier enactment: and, this being so, no change was made in

the original clause relating to the power to prohibit: *Allison v. Hatton*, 46 Or. 370 (80 Pac. 101).

No error having been committed as alleged, the decree is affirmed.

AFFIRMED.

Argued 9 April, decided 28 May, 1907.

MacDONALD v. LANE.

90 Pac. 181.

LIMITS OF POWER OF CITY—CREATION OF OFFICE.

1. A municipal charter is a grant of power and the municipality has only those powers expressly or incidentally conferred, and therefore cannot create an office not provided for by the granting instrument.

MUNICIPALITIES—RIGHT OF COUNCIL TO CREATE AND FILL POSITION OF JANITOR OF MUNICIPAL COURT—CIVIL SERVICE.

2. The position of janitor, bailiff and assistant clerk of the municipal court created by ordinance is not an office and its incumbent is not an officer within the meaning of Section 306 of the Portland charter of 1903, but is a place in the subordinate administrative service of the city, and its incumbent must attain it through the regulations of the civil service.

POWER OF MAYOR TO APPOINT EMPLOYEES.

3. Under Section 155, Portland charter of 1903, providing that the mayor shall appoint all officers of the city whose election or appointment is not expressly provided for by law or in the charter, he cannot appoint mere employees, as their positions are under the civil service, nor any officers except those whose appointment shall not be otherwise provided for when the appointment shall be made.

RIGHT TO SALARY FROM CITY.

4. Under Sections 309, 314 and 319, Portland charter of 1903, one claiming a salary from the city must show either that he was appointed under the civil service rules or that the place he is occupying has not been classified under the civil service rules, and he is occupying it temporarily by appointment, or that he was appointed under an emergency.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Statement by MR. JUSTICE EAKIN.

Judgment was rendered upon a demurrer to the writ of mandamus, and defendant appeals. A writ of mandamus was issued to the defendant, Harry Lane, as Mayor of the City of Portland, reciting that Ordinance No. 15,328 was on May 2, 1906, duly enacted by the common council of that city and in force and effect, in the following language, viz.:

"An ordinance providing for the appointment of a bailiff and janitor of the municipal court.

The City of Portland does ordain as follows:

Section 1. That there shall be appointed by the council a person who shall have the general supervision of the municipal court room as a janitor, and shall also attend the said court and act as bailiff thereof at each of its sessions, and shall also act as assistant clerk of said court, and be subject to the orders of the court.

Sec. 2. That the salary of said person shall be \$80 per month.

Sec. 3. That James MacDonald is hereby appointed to said office during the pleasure of the council.

Passed the council April 11, 1906."

The writ then recites that thereafter, on May 3, 1906, the said Jas. MacDonald entered upon his duties, as specified in said ordinance, and has ever since continued to fulfill and perform all and several the acts and things required by such ordinance, and that thereafter, on June 18, 1906, his salary for the month of May, \$74.67, was duly certified by the city auditor, and a warrant issued by said auditor upon the city treasurer therefor and duly presented to the defendant, as mayor, for his signature, but he refused to sign it, and is required by the writ to sign the same, or show cause why he has not done so; and upon the overruling of the demurrer the defendant declined to plead further, and judgment was entered requiring him as mayor to sign the said warrant.

REVERSED.

For appellant there was a brief over the names of *Thomas C. Greene* and *Richard W. Montague*, with an oral argument by *Mr. Montague*.

For respondent there was a brief and an oral argument by *Mr. John Francis Logan*.

Opinion by MR. JUSTICE EAKIN.

The only question raised by the appeal is the authority of the city council to appoint plaintiff to the place created by the ordinance, defendant claiming that by the terms of Section 306 of the charter the appointment must be made under the civil service rules of the charter and not by the arbitrary appointment of the council. That section is in the following language:

"Sec. 306. All appointments to and promotions in the subordinate administrative service of the city shall be made solely according to fitness, which shall be ascertained by open competitive examination, and merit and fidelity in service, as provided for in this article. The provisions of this article shall apply to the incumbents of all offices, places and employments in the public service of the city, except the following: All officers chosen by popular election or by appointment by the council, the members of all boards and commissions, the judges and clerks of election, the deputies of the city attorney, the chief deputy of the city treasurer, the city engineer, the chief of police department, the superintendent and the chief engineer of the water department, and the secretary of the civil service commission, the mayor's secretary, the members of the health department, and the librarian."

1. Plaintiff claims that this appointment is saved to the council in the exception of "officers chosen * * by appointment by the council." If this were an office which the council had authority to create by the ordinance, then, possibly, it might come within such exception, but the city council has no power to create an office not provided for in the charter. The charter is a grant of power, and the municipality possesses only those properties which the charter confers upon it, either expressly or as incidental to the execution of its powers: *City of Corvallis v. Carlile*, 10 Or. 139 (45 Am. Rep. 134); *Beers v. Dalles City* 16 Or. 334 (18 Pac. 835).

2. The ordinance makes provision for a place or employment for clerical and other aid in connection with the municipal court, which it has authority to do, but the place is not an office, and the appointment of a person to such place is not within the exception of Section 306. This section is definite as to the offices and employments that shall be subject to the civil service, viz., "all offices, places and employments in the public service of the city," except certain offices and employments especially named, and the only exception in favor of appointments by the council is of "Officers chosen * * by appointment of the council." The charter is very complete in making provision for the administration of the affairs of the city government. It is divided into 13 or 14 departments, and in each case names the appointing

power for the subordinate service, and the council cannot usurp that power and make the appointments. But the employment created by this ordinance is not provided for by the charter. It must be authorized by the council before such an appointment can be made, and, if it is one within any of the executive departments of the city government, as established by the charter, in which the appointing power is already provided, then the council cannot exercise it; but, if such appointment is not within the purview of such provisions, the council may provide for it.

3. This does no violence to Section 155 of the charter, which provides:

"The mayor shall appoint all officers of the city whose election or appointment is not otherwise expressly provided for in this charter, or by law."

This section is not intended to place all appointing power in the mayor, but to cover cases of officers not otherwise provided for, and its language does not have exclusive reference to conditions at the date of the charter, but will include subsequent amendments of it, or subsequent laws applicable thereto. In other words, the section refers to conditions as they may exist at the time of the appointment. Further, this section authorizes the mayor to appoint "all officers," and does not include employees that are not officers. But, when the place is created and is one within the "subordinate administrative service" made subject to the civil service law, as provided by Section 306, then it falls within its scope and policy. In *People ex rel. v. Roberts*, 148 N. Y. 360 (42 N. E. 1082; 31 L. R. A. 399), it is held that the civil service law "constitutes a general system in terms applicable to the whole service. It is not limited to any particular department, but is broad enough to embrace all. Statutes of this character, framed in general terms, apply to new cases as they arise from time to time that fall within their general scope and policy. Since the enactment of the civil service laws, new offices have been created, to which the power to appoint subordinates attached, but it cannot be doubted that this power,

when given, came within the operation of all general regulations on the subject." And the employment provided for by this ordinance is within the subordinate administrative service mentioned in Section 306 and subject to the civil service regulations.

4. Although the council may determine the appointing power, the appointment must be made under the civil service law, as provided in Article 9, c. 4. of the charter. The provisions of the charter relating to this matter are:

"Sec. 309. The commission shall classify, with reference to the examinations hereinafter provided for, all the offices, places and employments in the public service of the city to which the provisions of this article are applicable. Such classification shall be based upon the respective functions of said offices, places and employments, and the compensation attached thereto, and shall be arranged so as to permit the grading of offices, places and employments of like character in groups and subdivisions. The offices, places and employments so classified shall constitute the classified civil service of the city; and after the taking effect of this charter, no appointment or promotion to any such office, place or position shall be made, except in the manner provided in this article."

"Sec. 314. In the absence and pending the preparation of an appropriate eligible list from which appointments can be made, or, in extraordinary emergencies, to prevent delay or injury to the public business, any office, place or employment in the classified civil service may be filled temporarily by the appointing authority, but not for a longer period than thirty days."

"Sec. 319. No officer or employee of the city shall draw, sign, countersign or issue any warrant or order for the payment of, or pay any salary or compensation to, any person in the classified civil service who is not certified by the commission to the auditor as having been appointed or employed in pursuance of this article, and of the regulations in force thereunder."

Thus it appears from Section 309 that Section 306 can only be made operative as to such subordinate offices, places and employments of the city as have been classified by the civil service commission constituting the "classified civil service," and provision has been made for the examination of applicants thereunder. Under the quotation from Section 319 above, one who seeks the auditing and payment of his claim for compensation

for service rendered in an employment included in the classified civil service must be certified by the commission to the auditor as having been appointed in pursuance of such civil service law, and by the terms of that provision neither the mayor nor any other officer of the city can issue or sign a warrant for payment of compensation to any one in the classified civil service without being so certified. In *People ex rel. v. Roberts*, 148 N. Y. 360 (31 L. R. A. 399; 42 N. E. 1082), the relator was appointed to a clerkship which was included in the classification of offices and employments under a civil service law similar in that particular to this charter, but not from the list of eligible candidates upon the civil service register. He brought mandamus to require the comptroller to audit his claim for salary. The question of his right to the office was raised, and it was held that, when it appears that the position has been classified by the commission in pursuance of the civil service act, he is not entitled to mandamus against the comptroller in the absence of a certificate from the commission that he has been duly appointed under the civil service act. The employment provided for by this ordinance, although not included in the charter, is in the subordinate administrative service, and comes within the operation of all general regulations of the civil service law, and the appointment to such place must be made thereunder. To entitle plaintiff to a warrant for his salary, the burden is on him to show that he was appointed pursuant to the civil service requirements, or that the place had not been classified by the commission under Section 309, and that his appointment was made under the emergency of Section 314, but, in the absence of such a showing, the mayor cannot be deemed in default for refusing to sign his warrant. Therefore the alternative writ is insufficient to entitle him to the relief sought, and the demurrer should have been sustained.

The judgment is reversed and remanded to the lower court with directions to sustain the demurrer, and for such further proceedings as may be deemed proper not inconsistent with this opinion.

REVERSED.

Decided 11 June, rehearing denied 31 December, 1907.

McLEOD v. DESPAIN.

90 Pac. 492, 92 Pac. 1088.

BILLS AND NOTES—EFFECT OF SIGNING AS "TRUSTEE."

1. The personal liability of the signer of a promissory note is not affected by the addition of the word "trustee," after his name.

NOTES—TRUSTEE—CIRCUMSTANCES AS NOTICE.

2. A person who learns of unusual circumstances connected with a transaction in which he is about to become interested, or of such facts as would put a person of ordinary prudence upon inquiry, as, that a note is payable to the payee, "trustee," or that a title is held by a person "trustee," is bound thereby to a knowledge of what could have been discovered by investigation.

EFFECT OF WORD "TRUSTEE" IN WRITING.

3. The appearance of the word "trustee," added to a payee's name in a note, or to a grantee's name in a deed or mortgage, or in connection with the name of a party to a written instrument, is sufficient to put persons dealing with such trustee upon inquiry, and, in the absence of inquiry, they will be presumed to have known what they might have discovered.

A landowner being heavily indebted at a high rate of interest, solicited a broker to procure the money on more advantageous terms, which he did by interesting several friends in varying amounts. The debtor then executed to the broker, "trustee" notes for the respective friends, and the notes were indorsed and guaranteed by the broker, "trustee." The original note and mortgage were assigned to the broker, "trustee," it being considered as the security for the series of notes made for the new lenders. *Held*, that the friends were put upon inquiry as to the conditions of the transaction, and were bound to know all that they might have discovered about the payments of the borrower and what was being done with the money, since the appearance of the word "trustee" implied that the broker was not acting for himself.

AGENCY—LIMITATION OF RIGHT OF RATIFICATION.

4. The right of a principal to ratify unauthorized acts of his agent is subject to the limitation that he must ratify the act entirely or disaffirm it—he cannot accept the benefits and repudiate the obligations.

Where an agent held possession of the security for a series of notes owned by different persons, and received for them both interest and partial payments, they cannot recognize his authority for the purpose of such collections as they received and deny it as to other payments which he retained and converted.

AGENCY—DUTY TO TRACE APPLICATION OF PAYMENT.

5. One who pays his obligation to an agent of the payee having the evidence of the debt in his possession is not under obligation to see that the payment reaches the creditor, though that may not be the case where the payment is made to the payee after he has sold and delivered the obligation and does not produce it when payment is tendered: *Bamberger v. Geiser*, 24 Or. 307, distinguished.

AGENCY—TERMINATION OF BY INSOLVENCY.

6. An agency may be presumed to continue until it is shown to have been terminated, but it will cease without any definite act of the principal upon the general knowledge of his insolvency.

AGENCY—CASE UNDER CONSIDERATION.

7. Defendants, who had had a debt of \$28,000 evidenced by a note secured by mortgages, applied to W. to furnish money to pay the indebtedness and take an assignment of the note and mortgages. W. secured the money from plaintiff and others, and assigned to them notes made by the defendant and payable to him as trustee and secured by the original note and mortgages. He held the original notes and security and all the other notes except those of plaintiff and S. He received payments sufficient to pay all the notes, but did not credit them on the notes of plaintiff and S., or pay the money to them. He continued under the trust without his right being questioned until he became insolvent. *Held*, that W. was the agent of plaintiff and S., with full authority to collect the sums represented by the notes, and so collected the money which was paid to him in trust for their benefit with their full knowledge and assent, and that, sufficient having been paid to him in that capacity to cancel the principal and interest of all the notes given, they, together with the mortgages, should be canceled.

EVIDENCE—CONTEMPORANEOUSNESS NOT DETERMINED BY DATES.

8. Papers relating to a stated transaction are all to be considered together, and the dates are not controlling.

VALIDITY OF GUARANTEE BY AGENT TO PRINCIPAL.

9. An agent may lawfully guarantee to his principal the payment of obligations that he has taken in the course of his agency proceedings.

PRINCIPAL AND AGENT—RIGHT OF RATIFICATION.

10. The principal must adopt or reject the unauthorized acts of his agent as an entirety.

EXECUTED CONTRACTS—STATUTE OF FRAUDS.

11. Agreements either oral, or partly written, are binding on the parties and not subject to the statute of frauds, after being executed.

BOOKS OF TRUSTEE AS EVIDENCE.

12. The books of account kept by a trustee are admissible against his principal to show admissions against interest, as, the amounts of money received for the benefit of his principal, and also to show disbursements made within the scope of his authority.

TRUSTEE—ILLUSTRATION OF IMPROPER DISBURSEMENT.

13. An agent having authority to collect a large note accepted a farm for a stated amount and entered it as cash in his agency account, after which he loaned it without authority to the debtors. *Held*, that the debtors are entitled to credit for the amount paid, the question of its disbursement being entirely between the agent and his principal.

From Umatilla: WILLIAM R. ELLIS, Judge.

Statement by MR. COMMISSIONER KING.

This is a suit in equity by J. S. McLeod to foreclose three mortgages executed by Nancy E. Despain, Florence L. Berkeley, Bernice C. Dickson, Albert M. Despain, Edith Geraldine (Despain) Berkeley, together with Louise B. Despain, Eleanor M. Despain and Constance A. Despain, minors, by their guard-

ian, Nancy E. Despain, who with Norborne Berkeley, H. Dickson and Chas. C. Berkeley, constitute the appellants herein. These mortgages were given to J. N. Teal to secure a note for \$28,000, dated March 28, 1898, payable five years after date, with interest at the rate of 8 per cent per annum, and, together with the note, were assigned to C. B. Wade, trustee, to secure certain other notes thereafter executed to him as such trustee, one of which was assigned to plaintiff, McLeod, and one to Lina H. Sturgis, who constitute the respondents herein. The remainder of the notes so executed were indorsed by Wade to other persons not parties to this suit. Lina H. Sturgis was made a party defendant and answered, asserting her claim in the mortgage to the extent of her interest therein, as evidenced by her note. Wade was made a nominal party defendant; but not having been served with summons, made no appearance. Various other persons, not involved here, were also made defendants on account of interests claimed by them in the after-acquired mortgaged property. McLeod demands a decree foreclosing the mortgages to satisfy the sum of \$7,000, with unpaid interest, while Sturgis prays a decree of foreclosure for an alleged unpaid balance of \$1,157.45, with interest. Appellants, by their answer, allege that all the notes and mortgages were paid in full to Wade as agent and trustee of respondents, and ask a decree dismissing the suit, together with affirmative relief to the effect that all the notes referred to be declared paid and the mortgages canceled of record. A trial was had before the court, resulting in a decree in favor of the respondents, as prayed for, from which decree this appeal is taken.

REVERSED.

For appellants there was a brief with oral arguments by *Mr. Charles Harrison Carter*, *Mr. Wirt Minor* and *Mr. Thomas Griffin Hailey*.

For respondent McLeod there was a brief over the name of *McCourt & Phelps*, with an oral argument by *Mr. John McCourt*.

For respondent Sturgis there was a brief and an oral argument by *Mr. James A. Fee*.

Opinion by MR. COMMISSIONER KING.

The facts leading up to this suit, as we gather them from the record, are substantially as follows: In March, 1898, appellants borrowed \$28,000 from J. N. Teal, of Portland, Oregon, executing their promissory note therefor, payable to his order five years after its date at the Pendleton Savings Bank, Pendleton, Oregon, with interest at the rate of 8 per cent per annum. To secure the payment of this note, three mortgages were also executed and duly recorded, covering certain lands in Umatilla County, Oregon. In June of the same year appellants, desiring to reduce the rate of interest and in order to sell their lands and apply the proceeds upon the indebtedness, wanted the privilege of paying the principal and interest before due, and, as Teal would not accede to these terms, but was willing to receive the full amount at any time, they made application for a loan to C. B. Wade, then cashier of the First National Bank, of Pendleton, Oregon. Norborne Berkeley testified that, as their agent, he made the application, and that the first time he spoke to Wade concerning the loan he answered: "We haven't got the money now, but can probably let you have it later"; that during the same week he renewed the request, and Wade replied: "I think we can get the money now, and will let you have it." After talking the matter over, he told Wade that, if he would buy the Teal note and hold it and allow them to pay it off in such sums as they could, it would suit them better than as it was, since they wanted to sell certain ranches and apply the proceeds on their obligation. Wade was to give them a lower rate of interest, and for his services in the transaction would charge \$1,500, all of which was agreed to; and after learning that Wade had received the note and mortgages from Teal appellants executed eight promissory notes, made payable to "C. B. Wade, trustee," dated June 29, 1898, with interest at the rate of 7 per cent per annum, payable semiannually, "on or before five years from date." The notes aggregated \$29,500, as follows: Two for \$7,000 each, and two for \$2,500, two for \$1,500, one for \$3,500, and one for \$1,000. One of the \$1,500-notes

represented the bonus to Wade. All the signatures of the new notes were procured within a short time after Wade received the Teal note and mortgages duly assigned. The new notes were accordingly turned over to him, and, with the exception of the bonus note, were duly assigned to the parties advancing the money.

As a part of the transaction, appellants and Wade entered into an agreement concerning the payment and disbursement of rents to be received on the property, which on June 30, 1898, was reduced to writing, and, omitting the signatures, is as follows:

"This Agreement, made and entered into this 30th day of June, 1898, by and between N. E. Despain, Florence L. Berkeley and Norborne Berkeley, Jr., her husband, Bernice Dickson, and Haldane Dickson, her husband, Albert M. Despain, Edith G. Despain, and N. E. Despain as guardian of the persons and estates of Louis B. Despain, Eleanor Despain and Constance A. Despain, minors, parties of the first part, and C. B. Wade, trustee, party of the second part, Witnesseth:

That, Whereas, the first parties have borrowed of C. B. Wade, trustee, party of the second part, twenty-eight thousand dollars (\$28,000), payable on or before five years, and bearing interest at the rate of seven per cent per annum, said loan being secured by a note and mortgage for \$28,000, which note is secured by a real estate mortgage on certain city property in the City of Pendleton, and farm lands in Umatilla County, Oregon, same having been duly executed and delivered to J. N. Teal, of Portland, Oregon, by said first parties, and by said J. N. Teal duly assigned to second party hereunto;

Therefore, in Consideration of the Premises, and for the further security of said C. B. Wade, trustee, said first parties hereto do sell, transfer, set over and assign to C. B. Wade, trustee, all the rents and profits of the property in the City of Pendleton, described in said mortgage from said first parties to J. N. Teal, for the period of five years, unless said sum of twenty-eight thousand dollars (\$28,000), and interest thereon, shall have been sooner paid to said second party.

First Parties do Further Agree that they will, without expense to said second party, collect and deposit in the First National Bank of Pendleton, Oregon, to the credit of the second party, the rents and profits of mortgaged property within limits of the City of Pendleton.

And Said Second Party Agrees (1) that of moneys so deposited by said first parties, if same be sufficient therefor, he will pay or cause to be paid to N. E. Despain, the sum of one hundred fifty dollars (\$150) per month; (2) that he will pay interest on said loan semiannually; (3) that he will pay premiums on such fire insurance policies as may be procured, subject to approval of second party, by said first parties on property in City of Pendleton material to this agreement; and (4) that if, after such payments as hereinbefore set forth are paid, there remains any balance of such rents and profits, the same shall be paid on principal of said loan of twenty-eight thousand dollars (\$28,000); provided, however, that if first parties shall be unable to pay taxes assessed against said property the party of first part may pay such taxes from such balance, if any there be."

It appears that after receiving the application Wade spoke to McLeod, Sturgis and others concerning it, explaining the time, terms and conditions desired, and suggested that they advance the necessary money, indicating it would be a safe investment, for the reason he would procure an assignment of the note and mortgages from Teal to himself, as trustee; and, as an additional safeguard, he would arrange to have all rents from the property, together with receipts of sales of lands, if sold, paid to him during the period of the loan, which he would apply in payment of the interest, when due, and credit the excess upon the principal. With this understanding McLeod furnished \$7,000, Lina H. Sturgis a like sum, while the balance of the funds was advanced by other parties not involved here. The money advanced, being sufficient for the desired purpose, amounting to \$28,000, was paid over to Wade, who, with full knowledge, consent and request of all concerned, paid the same to Teal. The assignment was in the usual form, dated June 29, 1898, and executed to "C. B. Wade, trustee"; the note being indorsed, "without recourse to J. N. Teal."

The new notes were given for the purpose of indicating and specifying in writing the terms of payment of the obligation represented by the Teal note and mortgages, as well as to indicate the interest each of the parties advancing the money might have in the entire indebtedness and mortgage security, includ-

ing the additional \$1,500 bonus note given. These notes were executed, assigned and accepted with the full knowledge and understanding of all the parties concerned that Wade, as trustee, was to hold the Teal note and mortgages, and neither the note nor mortgages should be deemed discharged until the amounts specified in the new notes should be fully paid. Wade accordingly entered upon his trust, retained possession of the Teal note and mortgages, received all rents and other proceeds from time to time, and, after paying the amounts excepted under the contract, credited the excess on the new notes until the \$29,500, with interest, was paid, except the sums involved in this suit, all of which were paid to him to apply on the notes; but the money for which a decree is here demanded was neither credited thereon nor paid to the respondents. He so continued under the trust, without his right to do so being questioned, until September 8, 1903, when he became insolvent. After the execution of the new notes they were indorsed by Wade to the various persons entitled thereto. McLeod retained his note in his possession, while the Sturgis note was held by Hartman as her agent; but all credits on these notes were placed there by Wade, who was given the notes by the holders for that purpose as the money was paid to them.

Prior to the date Wade's insolvency became known, tracts of the mortgaged land were sold from time to time, and releases duly executed by Wade, as trustee, and the moneys received therefor in accordance with the understanding and agreement between the parties concerned. During all this time and for many years prior thereto, Wade was cashier of the First National Bank of Pendleton, Oregon, and plaintiff, McLeod, was a director and stockholder only. The money was deposited in this bank as received, and entered on its books under the account of "Wade-Despain Trust." As payments were made to the holders of the notes, checks were given by Wade, signed "Wade-Despain Trust." Like checks were given for all other disbursements made by him under the written agreement. In this manner Wade kept a memorandum of moneys received and paid on the notes, as

well as of all disbursements under the contract. When the notes were assigned to McLeod and Sturgis, Wade guaranteed the payment thereof in the following language, indorsed on the back of each note:

"This note is secured by a note of \$28,000, signed by the same parties, which is secured by real estate mortgages assigned to C. B. Wade, trustee. For value received I hereby guarantee payment of this note and waive protest, demand, notice of non-payment thereof.
C. B. Wade, Trustee."

It is urged by counsel for respondents that during the entire transaction, and until his insolvency, Wade was the agent only of appellants, and that respondents are *bona fide* purchasers of the new notes, and that, by operation of law, these notes carry with them the Teal mortgages; that the new notes were intended to be substituted for the old, and by oral agreement these mortgages were to secure their payment; that this oral agreement is supplemented by the statement indorsed on the new notes given: "This note is secured by a note of \$28,000, signed by the same parties, which is secured by real estate mortgages assigned to C. B. Wade, trustee." Appellants' counsel insist that Wade was only respondents' trustee and agent, and that, sufficient money having been paid him to cover the entire claim growing out of the deal, they were released from any further obligations. It appears that appellants' object in procuring the money with which to take up the Teal note and mortgages was for the purpose, first, of reducing the rate of interest from 8 per cent per annum to 7 per cent; second, to secure the privilege of paying the principal and interest at any time and in order that the realty could be sold and mortgages released as sales were made, thereby enabling the indebtedness to be extinguished as soon as practicable. To accomplish these objects they were willing to pay a \$1,500 bonus, and were not only willing to pay this additional sum, but consented to and did enter into the agreement whereby all the rents and proceeds from sales should be paid to the holder of the mortgage security. With notice of these conditions, consisting of both actual and constructive knowledge, respondents advanced the money with which to

purchase the Teal note and mortgages, and, as a means of segregating and evidencing the respective interests therein of each of the several persons advancing the money, as well as to show a change in the terms of payment and rate of interest, the new notes were given. The transaction was, in effect, the same as if all the new terms and conditions of payment were indorsed on the old note and mortgage, the difference being, under the method adopted, that each person, if desired, might hold the written instrument evidencing his or her interest, while leaving the security in Wade's possession, thereby making it more convenient for all, in that Wade could act as agent and trustee for each party represented. In this way the sales were to be facilitated as well as the payment of the indebtedness insured, and thereby carry into effect one of the main objects in changing creditors. It is clearly apparent that the new notes were given and the negotiations perfected in this manner, and with this object in view. As evidence that there should be but the one debt and that neither the Teal note nor mortgages should be deemed paid or canceled, all were assigned to Wade as trustee; and to make certain that the note and mortgages should be kept alive, this fact was stamped on the back of the new notes as executed.

1. For the purpose of assuring the payment of the \$1,500 promised him, Wade not only consented to act as trustee for the holders of the notes, but was willing to guarantee payment of the notes held by respondents, and accordingly indorsed the notes as guarantor, and, as such indorser, was personally bound, notwithstanding the fact that the word "trustee" was added to his name: *Ogden Railway Co. v. Wright*. 31 Or. 150 (49 Pac. 975).

The date of the written agreement executed to Wade, as trustee, by appellants is immaterial, as the transaction must be considered as a whole, even though it consumed more than one day. While there is no direct testimony that Sturgis had actual knowledge of such understanding, it does appear that McLeod relied upon an agreement to that effect. On this point McLeod testified:

“Q. Did he (Wade) tell you anything about having these other notes further secured by having the city rents turned over to him?

A. I asked him (Wade) how he was to pay the interest on these notes. He said the rents was to come to him, and if any of the property was sold they would apply it on these notes. That is the reason he gave on or before five years after date so that they could have a chance to sell it.

Q. He also told you he would have these rents assigned to him to apply on the notes?

A. He said he could pay the interest because he was getting the rents.

Q. They hadn't been going to him prior to that time, had they?

A. I don't know.

Q. As I understood you on direct examination, you said Mr. Wade told you he was collecting the rents; are you entirely correct in that?

A. Yes, sir; he said he was getting their rents.

Q. Didn't he tell you he would have these rents turned over to him so they could be applied on the interest?

A. Yes, sir; that is what he said, he was getting the rents.

Q. On his explanation to you of how this \$28,000 note was assigned to him and held as security for the payment of the amount due on these others, you felt it was safe and you put up your money?

A. I thought so or I would not have done it.”

Mr. Hartman, the agent of Sturgis, testified:

“Q. He (Wade) was to hold that \$28,000 note and mortgage to secure the payment of this?

A. Yes, sir.

Q. That was the agreement at the time?

A. Yes, sir; to be assigned by Despain and secured by this \$28,000 mortgage.

Q. Wade was to hold it as trustee?

A. He was to hold it as security for this note.

Q. Do you know whether or not Mr. Wade collected the rents from this property?

A. I so understood it.”

This testimony, taken together with the fact which is testified to by both McLeod and Hartman, that all the interest and moneys paid and credited on the notes came through Wade's hands and were indorsed thereon by him; that appellants' property was sold from time to time, and the mortgages released, with the full knowledge of both McLeod and the agent of Sturgis, and that all money received on the notes came from such sales and rents; that such sales were made and releases executed without objection on their part, and apparently with their approval, they receiving their portions of the money as applied in payment of interest, etc.,—all furnish strong evidence tending to show full knowledge and notice of all the conditions and terms under which the notes were executed.

2. But, if it be assumed, as contended by respondents' counsel, that the new notes were executed with the object of thereafter being indorsed and sold by Wade for the purpose of raising the money with which to take up the Teal note and mortgage, it must then be conceded that, for the purpose of making this sale and applying the proceeds as agreed, Wade for the time being was the agent of the Despains, and, in that respect, their trustee, and continued as such until the consummation of the sale of the notes and application of the proceeds as directed. It would then follow that the word "trustee" was added that it might be known there was a *cestui que trust*, and that conditions were to be performed by the trustee for the beneficiaries. Then would not this word attached to the payee's name impart notice, or at least be sufficient to put the purchaser upon inquiry, as to the terms and conditions under which the trust was created? In *Wills v. Wilson*, 3 Or. 310, the court states the rule to be that, "when the circumstances are such as would excite suspicion and naturally attract the attention, a party will be presumed to have been put upon inquiry, and if he does not inquire he will be presumed to have known the facts." To the same effect are *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56 (55 N. W. 825; 40 Am. St. Rep. 299), and *Shaw v. Spencer*, 100 Mass. 382 (97 Am. Dec. 107; 1 Am. Rep. 115). In the

case at bar respondents concede that they entered into a combination with several other parties to furnish the money with which to take up the \$28,000 note and mortgages securing it. It clearly appears from the evidence that in order to do so safely and satisfactorily to all concerned many conditions were involved. The old note with mortgages securing it were to be assigned to Wade as trustee, to be held to secure the assignees of the new notes which were to be given. He was to receive notes, specifying the various interests of each, with new terms included, and assign them to the various parties advancing the money, as their interest would appear. All the money so furnished was to pass through Wade's hands. In brief, Wade was to be the "go-between" for all parties until the transaction was completed. He became agent for Teal in holding the note and mortgages until the money was paid, and, under respondents' contention, agent for appellants in procuring the funds to pay Teal, as well as agent for respondents to invest their money. These circumstances, taken together with the word "trustee" added to his name in the notes, were certainly sufficient to attract attention and cause an average business man to closely scrutinize all the terms and conditions under which the entire deal was consummated.

In *Shaw v. Spencer*, 100 Mass. 382 (97 Am. Dec. 107; 1 Am. Rep. 115), Mr. Justice FOSTER, in discussing this question, says: "Notice of the existence of a trust is by all the authorities held to impose the duty of inquiry as to its character and limitations. And whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led." Among authorities to the same effect are: *Randolph*, Com. P. (1 ed.), § 444; *Daniel*, Neg. Inst. (5 ed.), § 271; *Prather v. Weissiger*, 10 Bush (Ky.), 117; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; *Duncan v. Jaudon*, 82 U. S. (15 Wall.) 165, 175 (21 L. Ed. 142); *Railroad Co. v. Durant*, 95 U. S. 576, 577 (24 L. Ed. 391); *National Bank v. Insurance Co.* 104 U. S. 54 (26 L. Ed. 693); 34 Cent. L. J. 45; *Smith v. Burgess*, 133 Mass. 511; *Third Nat. Bank v.*

Lange, 51 Md. 138 (34 Am. Rep. 304). A few states appear to hold to the contrary rule. Indiana and Missouri are cited as holding that words of this nature affixed to the name of a payee are merely *descriptio personae*: *Speelman v. Culbertson*, 15 Ind. 441; *Powell v. Morrison*, 35 Mo. 244. The consideration and criticism of these cases by subsequent decisions weaken them as precedents. In *Speelman v. Culbertson*, the words, "administrators of the estate of John Babcock, deceased," appeared after the names of the payees; while in *Powell v. Morrison*, the note was payable to one "James Castello, Sheriff of St. Louis County." The court in announcing the opinion manifests much doubt as to the correctness of its position, while one of their number dissents.

In discussing this question in *Payne v. First Nat. Bank*, 43 Mo. App. 377, Mr. Justice BIGGS, speaking for the court, says: "There is a class of cases in this state which hold that a note, payable to a person as executor, guardian, agent or sheriff, is *prima facie* the payee's individual property; that the words 'executor,' 'guardian,' etc., are merely *descriptio personae*; and that such words are not sufficient within themselves to put a purchaser of such a note on inquiry as to conditions or limitations (if any) of the payee's power to pledge or sell, * * citing authorities of that state. The doctrine of the foregoing cases has for its foundation the reason that, in the execution of such trusts, the law contemplates that it will be necessary to collect or sell the trust property. Upon this reason the *prima facie* right of such payee to make any kind of disposition of the note is predicated. But, in our opinion, these cases are not applicable when the negotiation of instruments, or the sale of other property held by a trustee, is involved, and the instrument upon its face discloses the beneficial interest of another." This authority, after quoting with approval from *Shaw v. Spencer*, 100 Mass. 382 (97 Am. Dec. 107; 1 Am. Rep. 115), and *Duncan v. Jaudon*, 82 U. S. (15 Wall.) 165 (21 L. Ed. 142), adds: "These authorities are sufficient to show that the powers of a trustee as to the disposition of the trust property are quite the

reverse of those of an executor, guardian or sheriff. * * * The appellate court of Missouri in *Sparrow v. State Exch. Bank*, 103 Mo. App. 347 (77 S. W. 170), also observes: "It must be confessed that the rule declared by the Supreme Court of the United States in *National Bank v. Insurance Co.* 104 U. S. 54 (26 L. Ed. 693), and the cases in which it has been followed by that court, cannot be reconciled with that declared in the Missouri cases already alluded to. If the question here had not been authoritatively ruled by our own supreme court, we should be inclined to adopt that declared by the Supreme Court of the United States, since the reasoning in those cases by that great court in favor of the rule therein announced, it seems, are of the most cogent and persuasive nature."

3. We find on examination of the cases sustaining respondents' contention on this point that most of the authorities upholding that view manifest some doubt as to the soundness of their position. This point has not heretofore been directly before this court; but we find the great weight of authority, as well as the better reasoning, supports the rule that the word "trustee," added to a payee's name in a written instrument, is sufficient to put the purchaser upon inquiry as to all the terms and conditions under which it may have been executed, and in the absence of such inquiry knowledge thereof will be presumed. We also deem a recognition of this rule necessary to properly protect the beneficiaries of such trusts; otherwise, under the claim of being a *bona fide* purchaser, through the neglect of the assignee of an instrument to make inquiry, the *cestuis que trustent* in many instances would, without fault on their part, suffer great loss. The adoption of the rule here recognized protects the innocent without hardship to investors; while the contrary doctrine offers an inducement to purchasers of this kind of property to neglect making inquiry as to the import of the word "trustee," by which the innocent must often suffer at the hands of dishonest trustees in whose selection it often happens the beneficiary has no voice.

When considered in the light of the many circumstances surrounding the transactions leading up to this suit, we cannot

avoid the conclusion that, if the notes were purchased in the manner claimed, having received the assignment of the notes made payable to the order of Wade, as trustee, they had full knowledge of all the agreements, oral or written, connected therewith. Even though Wade was a trustee for the appellants in disposing of the notes until the completion of all the arrangements, as urged, as well as agent for respondents to the extent of furnishing the "gilt edge paper" referred to, and in securing the assignment of the Teal note and mortgages to him for the benefit of the assignees of the new notes, yet such agency for defendants, though presumed to have continued until shown to have ceased, necessarily ended the moment the transaction became complete. On the completion of the deal the makers of the notes, by agreement, were absolutely bound to pay to Wade, as trustee, all rents received, as well as all proceeds resulting from the sale of the property. There was no discretion left for them to do otherwise. Unlike that of a principal and agent, they were not at liberty to disregard Wade's demands, whether the various agreements were oral or written, as the understanding between all concerned had been acted upon, Wade having entered upon the duties devolved upon him by the trust. The notes had been sold, mortgages assigned, and money advanced and paid as directed, of all which each of the parties thereto, whether obligors or obligees, had either actual or constructive knowledge. Wade thereby became fully recognized by respondents, not only by operation of law, but, in fact, as their trustee, to see that all the terms and conditions of the trust were carried out.

To insist that after the entire transaction was completed Wade was agent or trustee of appellants would be inconsistent with every principle governing business dealings between men, as this would make the mortgagors, through Wade as their agent, the holders of the securities given by them with an agreement to pay all proceeds of rents and sales over to themselves. Respondents would have been retaining the notes, and at the same time intrusting the mortgage securities to the pos-

session of the persons executing them. The record shows all persons interested to have at least good average business ability, which, when considered with the other facts, impels us to the conclusion that when the transaction became complete Wade became the trustee solely for the assignees of the notes, not only as claimed by respondents' counsel and, as evidently held by the learned court below, "merely as a receptacle or custodian raised by implication of law for the preservation of the mortgage security," but a trustee in the full sense of the word, with full authority to act for and in their behalf in the protection of their interests, including the authority to receive all payments to be applied on the notes until paid in full. In this connection it must be remembered that respondents were stockholders in the bank, while McLeod was a director. Wade had been for many years, and was then, the cashier. The notes presumably were all in his possession, except the two involved here, and all made payable not only to him as trustee, but at the bank of which he was cashier. All money applied in the payment of interest and cancellation of any notes given in the transaction was paid to Wade at this bank. Except as to the amounts sued upon, the notes were always taken to Wade when each payment was made on the interest or principal, and was by him indorsed on the notes. The Teal note and mortgages, as well as all the notes, except those assigned to McLeod and Sturgis, were there held by him and in his possession. Mortgages were released which, with all payments made through him, were known, recognized and acquiesced in by all concerned. Every act not only tended to give notice to the creditors of the existing conditions under which the trust was executed, but to impress more strongly on the debtors the fact that their agreements were recognized and that their payments were being made to the right person. That it was a case of misplaced confidence on both sides is self-evident. It is one of the numerous cases where one of two innocent persons must suffer because of the betrayal of a trust reposed in a third, and where the person most at fault must bear the loss: Story, Agency (9 ed.), § 127;

Bamberger v. Geiser, 24 Or. 207 (33 Pac. 609); *Kasson v. Noltner*, 43 Wis. 646.

4. In view of the facts and conditions stated, as gathered from the evidence, it conclusively appears that respondents were most at fault. For the purpose of bringing this suit they recognized Wade as their trustee, and one of the most unequivocal methods of showing a ratification of an agent's authority is the bringing of a suit based upon the agent's acts. They appear to recognize his authority where to their advantage, and to disclaim his acts where to their injury. It being to their advantage, he is recognized as the holder and trustee for the purpose of holding the Teal note and mortgage. The old note is recognized as having sufficient life to bridge the chasm between the mortgages and the new notes, but extinguished for any other purpose. Wade's authority is recognized as to moneys paid to him and credited on the notes, by reason of which the amounts so received are retained, but rejected as to the loss occasioned by his other receipts. It is elementary that this position cannot be upheld or recognized by a court of equity. When a principal elects to ratify any portion of an unauthorized act, he must ratify the whole of it. He cannot avail himself of such acts so far as beneficial to him, and repudiate its obligations whether such ratification be expressed or implied: *Mechem, Agency*, §§ 128, 130, 151; *LaGrande Nat. Bank v. Blum*, 27 Or. 215 (41 Pac. 659); *Noble v. Nugent*, 89 Ill. 522; *Hovey v. Blanchard*, 13 N. H. 145; *Kasson v. Noltner*, 43 Wis. 646.

5. It is contended, under the rule announced in *Bamberger v. Geiser*, 24 Or. 207 (33 Pac. 609), that it was the appellants' duty, when paying the money to Wade, to see that it was properly applied in the discharge of the indebtedness, and the court below must have so assumed in reaching the conclusion manifested by its decree. But the decision in the case referred to it not applicable to the facts governing the controversy before us. In that case the assignee not only received the note by assignment, but the mortgage was delivered into his possession and retained by him, while the money was paid to the first

mortgagees without any evidence of their right to receive it, and without even apparent authority to do so. In this case Wade, as trustee for the payee, retained possession of both the original note and mortgages, together with all other contracts, notes and writings, except the two new notes involved here, constituting the evidence of the terms, conditions and rate of interest under which the makers had the privilege of paying the portion of the original indebtedness owed by them, with the word "trustee" included, thereby imparting notice of the understanding and agreement that the amounts there specified could be paid to Wade as trustee. It, therefore, cannot be held, nor did this court in *Bumberger v. Geiser* hold, or mean to hold, that under such circumstances the persons making the payments were bound to see that the money was properly applied.

The principle here invoked was recognized in *Swegle v. Wells*, 7 Or. 222. There the defendants made application to Shaw & Henton, money brokers, for a loan, offering to secure the same by a real mortgage. They did not have the money, but reported the application to Swegle, who agreed to make the loan. It was agreed that the loan would be made in Henton's name, and the note made payable to him or bearer. A note and mortgage were executed accordingly, and the money paid into the hands of Shaw & Henton, who delivered it to the applicants. The note was then turned over to plaintiff, and while in his hands, before due, its maker paid the full amount therein to Shaw & Henton at their office. The defense raised was to the effect that the money was paid to plaintiff's agents, who were authorized to receive it, thereby canceling the note; while plaintiff there contended that Shaw & Henton were not his agents, and were without authority to collect the money, and that it was the duty of the defendant to have seen that the money was properly applied. Although a suit in equity was brought to foreclose the mortgage securing the note, the case was tried before a jury. This court there held that while the verdict of the jury was only advisory to the chancellor, not conclusive, and might be treated as a mere nullity if not supported by the evi-

dence, yet, there having been evidence to the effect that Shaw & Henton were in the real estate and brokerage business, and had been intrusted with the authority to make the loan, as well as with the authority to perfect the transaction and take the note payable to Henton, or bearer, notwithstanding the plaintiff was the lawful owner and holder of the note for value before due, with the note in his possession, the evidence was sufficient to show authority in Shaw & Henton to collect the amount named in the note, and the verdict of the jury would not be disturbed, and equitable relief was accordingly denied. To the same effect see 2 Kent, 613; *Wardrop v. Dunlop*, 1 Hun, 325; *Williams v. Walker*, 2 Sandford's Ch. 325; *Hatfield v. Reynolds*, 34 Barb. 612; *Lazier v. Horan*, 55 Iowa, 75 (7 N. W. 457: 39 Am. Rep. 167); *Palo Alto B. & I. Co. v. Mahar*, 65 Iowa, 75 (21 N. W. 187); *Thomassen v. Van Wyngaarden*, 65 Iowa, 687 (22 N. W. 927); *Kasson v. Noltner*, 43 Wis. 646.

6. Wade's authority to represent respondents, whether expressed or implied, did not cease until after his insolvency became known, and not until after all payments appearing in the evidence were made; he during all this time retaining the securities which the payments were intended to cancel. In *Hatfield v. Reynolds*, 34 Barb. 612, one Purdy, an attorney for Hatfield, made a loan for him to Reynolds. Purdy retained the security in possession for safekeeping, received the interest regularly, and finally the principal was paid to him. Purdy died insolvent without accounting to Hatfield. The lower court there held that such bond and mortgage were left with Purdy only for safekeeping, and not for the purpose of collecting either principal or interest; and, he having acted without authority, defendant was liable. On appeal, this decision was reversed, the court holding that, as plaintiff left the bond and mortgage with Purdy for safekeeping, and evidently permitted it to remain for other purposes, allowed payments to be made upon it to Purdy, received the amount of these payments from him and suffered him to indorse them upon the bond, it would be deemed from these facts, coupled with the circumstances attending the

origin of the bond and mortgage, that authority to Purdy to receive payments was implied, and observes: "I do not perceive that if the defendant had taken the precaution to call for the production of the papers whenever he made a payment, he would have strengthened this implication. The authority is implied from the possession of the papers and the continued receipt of money upon them, which are facts, and not from the exhibition of the papers by the agent, which is only the evidence of the facts. * * To have called for the bond and mortgage under the circumstances of this case, would have been a very prudent and proper precaution, but it would have been only a precaution. It would have enabled the defendant to verify the authority of Purdy, but it would have been no more than verifying it."

7. After a careful consideration of the evidence, as disclosed by the record and law applicable thereto, we can reach no other conclusion than that Wade was the agent of respondents with full authority to collect the sums represented by the notes given, and so collected the money which was paid to him in trust for the benefit of respondents with their full knowledge and assent; and that sufficient having been paid to him in that capacity to cancel the principal and interest of all the notes given, they, together with the mortgages, should be canceled. The prayer of the answers to that effect should, therefore, be granted.

The decree of the court below should be reversed, and one entered here in accordance with these views. REVERSED.

Decided 31 December, 1907.

ON MOTION FOR REHEARING.

Opinion by MR. COMMISSIONER KING.

8. Respondents, in their petition for rehearing, contend that we were in error in the statement in our former opinion to the effect that the signatures to the eight promissory notes, made payable to the order of C. B. Wade, trustee, were procured, and notes delivered, after he received the Teal note and mortgages duly assigned to him. It is true that the assignment of the

Teal instruments, as well as of the new notes, are dated June 29, 1898, and the written agreement between Wade and appellants is dated the day following; and, while the \$28,000 draft may have been forwarded to Teal by the Pendleton Savings Bank on July 1st, the money was actually paid to the bank for that purpose, and assignment of note and mortgages recorded, June 30, 1898. It is evident that respondents' counsel make no distinction between the dates as they appear on the instruments in evidence and the actual time when the various steps were taken, and that they overlook the governing feature that the various transactions, although requiring several days for completion, must be considered as a whole.

On these points various facts and circumstances sustain the conclusion heretofore reached, an instance of which we quote from the testimony of Norborne Berkeley as follows:

"Q. At the time this transaction was made, in what capacity, if any, were you acting for Mrs. Despain and the other defendants?

A. I was acting as their agent in handling the affairs of the Despain estate.

Q. Tell the court how it occurred.

A. We owed Mr. Teal, or rather Mr. D. P. Thompson, I think, by a note made to J. N. Teal, \$28,000. I thought there was an understanding we could pay part of it off, and I wrote to Teal and asked if we could sell a ranch and apply the money, and he said, 'No.' I thought that possibly we might get the money somewhere else, and I went to Mr. Wade. The first time I asked him if he could let us have \$28,000, he said: 'No, we haven't got the money now, but can probably let you have it later.' And, probably during the same week, I went back to ask him about it, and he said: 'Yes, I think we can get the money now, and will let you have it.' I told him: 'If you will buy this note and hold it and allow us to pay it off in such sums as we can, it will suit us better, as we want to sell certain ranches and apply it whenever we can.' He was to give us a lower rate of interest. We were paying 8 per cent, and he agreed to let us have it for 7, for which he would charge us \$1,500. When Mr. Wade told me they had the money, I went down there, and he had some notes prepared in the bank aggregating \$29,500. The understanding was the first one of the

notes paid was to be the bonus note paid to get the money, and get the concession of interest, and to be allowed to pay the matter off as we wanted to. We had been informed that Mr. Teal had sent his note and assignment of his mortgage to the Savings Bank, so Wade informed me when we went in there. We went down, and he took up the note and assignment of the mortgage, and when we got back he showed me he had this note in his possession. I surrendered him the \$29,500 note, or notes, with the understanding they should be kept together.

Q. Were you acting for them as agent in this transaction?

A. Yes, sir.

Q. You knew those notes were to raise that money to pay off that loan of Teal's?

A. No, I didn't know that they really owed the money before he got the notes; that is, he had the Teal assignment and Teal note before the notes were delivered to him.

Q. You say he had the money when the assignment was delivered to him. How do you know that?

A. I didn't say he had the money. I said he had the \$28,000 note and assignment of mortgage when the notes were delivered to him."

It is argued that McLeod received his note June 29, 1898, and our attention is directed to certain testimony in support of this contention; but the answers cited do not support this theory, nor do we find anything in the record to that effect. True, it is disclosed that McLeod gave a check to Wade on that date for \$7,000, for which he was to receive a note to be executed by appellants; but he does not state that the note was turned over at that time, and it is clear, from the record, that all the money necessary for taking up the Teal note and mortgages was advanced to Wade, and that the Teal instruments had been assigned to and were held by him as trustee, when this was done. All of this is consistent with Berkeley's statement to the effect that, when Wade told him he had the money, the notes were then prepared, and, on learning he had the assignment of the \$28,000 note and mortgages, the new notes were then delivered to him. McLeod's check, dated June 29th, is shown by the stamp of the bank thereon to have been cashed the following day. The testimony of both McLeod and Hartman indicates that it was the

understanding between all the parties that the new notes should be secured by an assignment of the Teal note and mortgages to Wade, as trustee, and should be held by him in that capacity; the legal title to remain in him until the \$29,500 consideration expressed in the new instruments should be paid in full, during all of which time the old note and mortgages should continue in full force and effect. By mutual consent he thereby became the holder and owner of the legal title to the indebtedness, as well as the party with whom defendants were expected to deal and to whom they were to make their payments. The claim of \$29,500 was, accordingly, represented by the various instruments in the aggregate, and, as formerly stated, was in the same position as if the contents, conditions and effect of all the new instruments and agreements had been written across or attached to the old note and securities, and made a part thereof, though the method adopted was more convenient by reason of the separate notes representing and distinguishing their respective interests, etc. It is, accordingly, immaterial whether the signatures of the new notes were secured before or after June 29th, as they were of no binding effect until the entire transaction, including the assignment of the Teal note and mortgages, became complete, which, by relation, antedates the delivery of the notes, and which fact respondents are estopped to question, since the new notes, on which a decree is here sought, contained the indorsement: "This note is secured by a note of \$28,000, signed by same parties, which is secured by real estate mortgages assigned to C. B. Wade, trustee." It is conceded that this indorsement was upon these notes at the time of their delivery. In fact, it is through this indorsement that respondents maintain their rights to foreclose the Teal mortgages.

It is also necessarily conceded that the old note and mortgages remained in force at least until the new notes were executed, which being true, it follows that when the new notes were delivered the Teal note and mortgages, by reason thereof, were either paid or not paid. If not paid, they then remained in

full force and effect until the entire indebtedness was liquidated, and, Wade having been made their custodian, and it having been required, as a part of the conditions upon which the money was advanced, that he should hold the same for respondents, it cannot be seriously questioned but that the payments made under such circumstances were made to the party authorized to receive them, and respondents would be bound accordingly. In that event, it would become a purchase outright, concerning which respondents would necessarily be bound by Wade's acts as much so as if the money advanced had been furnished without the execution and receipt of the new instruments. On the other hand, if the execution of the new notes paid the old debt, it would follow that the former note and mortgages became extinguished, and, while the new notes contain the indorsement that they are secured by the Teal instruments, yet, if paid and extinguished, this fact could be admissible only for the purpose of proving an oral agreement to execute a mortgage to secure the payment of the money advanced, or, what is its equivalent, an oral agreement to revive a mortgage that has been fully paid, to include not only the canceled claim, but an additional note of \$1,500. Whether such agreement could be enforced in equity is not necessary to a determination of this suit. It is sufficient to observe that respondents do not seek a specific performance of such contract, nor is an issue to that effect disclosed by the pleadings.

But it appears here that the mortgages and note were duly assigned to Wade, and that Teal was paid in full by him with funds advanced by respondents for that purpose, thereby, up to that point, making it a purchase outright. Then, as evidence of the fact that neither the mortgages nor the note were deemed canceled, it was expressly understood and agreed, and so stamped upon each note issued, that it was secured by the old note and mortgages, thus clearly indicating that each was to remain in force and effect, to be available at any time there should be a default in the payment of any portion thereof, in accordance with the terms of the new notes, which not only secured the

interest of each of the parties advancing the money with which the Teal note and mortgages were purchased, but contained the additional terms in reference to the interest and the time of payment granted to appellants. We thus find them retaining and using the old note and mortgages through Wade, as holder of the legal title, with which to secure the indebtedness represented by the new instrument. The illustration given by Sturgis' counsel, where a party may be made a trustee by mere operation of law to protect innocent holders of negotiable instruments, is not applicable to the case at bar. The notes here involved are held by persons who, in law as well as in fact, are parties to the agreement whereby Wade was made their trustee, and where, by express agreement stamped on the notes, it is provided that the old instruments shall secure the payment thereof, and that this security was to be held by this expressly created trustee. In the one instance the trustee is created by operation of law, and, in the other, by an express and implied agreement of all concerned. The act of Wade (in his effort to perfect the deal and thereby make certain the \$1,500 bonus, which he would otherwise have lost), in guaranteeing the payment of some of the notes, is not in any manner inconsistent with his position as agent for respondents during the transaction as well as after it became complete.

9. Nor are we aware of any rule precluding an agent from guaranteeing to his principal the payment of claims handled by him for such principal, especially, as in this case, where the agent was to be one of the beneficiaries in conjunction with the parties whom he was to and did represent. In this case, it appears that he was not only willing to guarantee the payment of some of the notes, but also consented to retain the old note and mortgage security, and that he received moneys from time to time, all of which constituted a means of aiding and insuring the payment of not only the full amount of money advanced, with interest, to the parties furnishing it, but his bonus as well, in proportion to the respective interests of each, thereby furnishing additional security to respondents for the money advanced by them. It is

hardly possible, nor is it reasonable, to assume that Wade was acting in any other capacity than as their agent, or to assume that, after the transaction was completed, he was agent for appellants in reference to matters here involved, for to do so would be to accept the conclusion that respondents adopted an extremely unbusinesslike method in this instance by retaining only the new notes, and, through Wade, as appellants' agent, permitting the payors and mortgagors to retain the mortgage security. The mere statement of this theory is sufficient for its answer.

It is also urged that there is nothing in the evidence of either of the parties indicating any agreement to the effect that the proceeds of the sale of the lands should be paid to Wade, and by him applied on the mortgage indebtedness, it being insisted that the proceeds received from the rent only could be thus considered. After a re-examination of the testimony, we find that the conclusion reached on this point in our former opinion is not only clearly deducible from the proceedings taken as a whole, but is manifest from the testimony of McLeod, as well as of Hartman, Sturgis' agent. McLeod, after stating that Wade was to hold the old note and mortgage as security for the notes, was asked:

"Q. Did he tell you anything about having these other notes further secured by having the city rents turned over to him?

A. I asked how he was to pay the interest on these notes. He said the rents was to come to him, and if any of the property was sold they would apply it on these notes. That is the reason he gave on or before five years after date, so they could have a chance to sell it.

Q. He also told you he would have these rents assigned to him to apply on the notes?

A. He said he could pay the interest because he was getting the rents.

Q. How did you get your interest payments you have on there? How was it paid to you and by whom?

A. He gave that credit on the back of them, and he made a memorandum of it always and held it, and always gave me credit on the back for it.

Q. Then you would bring in the note, and he would indorse the amount on the back?

A. Yes, sir."

That McLeod knew of the transactions going on, and received the benefits without objection, is manifested by the following question propounded to him, and his answer thereto: "Did you ask him (Wade) about any releases of mortgages he had made at any time? A. He said he was releasing property."

10. That Sturgis knew of the transactions, and with such knowledge recognized Wade as her agent and received the benefits thereof during all of this time, clearly appears from the various facts and circumstances disclosed by the record. For example, she authorized Wade to draw \$7,000 from her bank account with which to procure the Teal note and mortgages securing the same. Both she and McLeod understood that Wade should collect and receive the rents of the mortgaged property, that the debt should be paid in installments, and that Wade would hold the Teal mortgages as security for respondents' notes. They were largely interested in the bank in which he was cashier and trusted him with the money. They went to him for their payments and never approached the appellants, or any of them; and, in addition to these circumstances, Mr. Hartman, the agent of Sturgis, says:

"Q. Tell us what Mr. Wade told you about that note.

A. He said he was taking it up—this large note of Teal's for \$28,000— and wanted to handle it here at a reduced rate of interest, so that when the rents were collected, and any property sold, it could be applied on the payment of the notes in partial payments."

Here we have the purpose made known to Hartman before the deal was consummated, which, being followed with the making of Wade trustee for all, and acceptance of the note with statement endorsed thereon, through which she, with others interested, seek this foreclosure, makes the conclusion inevitable that Sturgis, with other respondents, in law, as well as in fact, recognized Wade as her agent; and while Wade, during the transaction until its completion, was the pivot around which all the

parties to the deal were acting, and to whom they looked for its proper consummation, his relationship with appellants, so far as the questions here involved were concerned, was at an end on its completion, and he thereafter continued as the agent of respondents only. He was made the custodian of and held the legal title to the Teal note and mortgages on which appellants, by agreement, oral and written, were bound to pay all rents and proceeds of sales to him, and in accordance therewith all payments were made to him, which acts respondents, to say the least, impliedly approved and did not question so long as they received the benefits, but seek to avoid that part of the arrangements thus made and recognized which may appear to be to their injury. It is settled that such cannot be sanctioned by courts of equity. Respondents, under such circumstances, are estopped from questioning Wade's authority to receive payments from defendants on this indebtedness, and that he was acting as their agent throughout the proceeding. It is too well settled to admit of serious discussion that the principal must adopt or reject the act of his agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens: *Coleman v. Stark*, 1 Or. 116; *La Grande Nat. Bank v. Blum*, 27 Or. 215 (41 Pac. 659).

11. We are quoted, in effect, as saying that all oral agreements between the parties were subsequently reduced to writing. In this deduction counsel are in error; our statement being that, as a part of the transaction, an agreement was entered into concerning the collection and disbursement of rents, which was afterwards reduced to writing, being the instrument there quoted. But we neither said, nor meant to say, that all the transactions were included in the written contract, as many took place afterwards. Nor was it necessary, under the status of the parties at the time suit was brought, that the written instruments should have included all dealings between them. Lands were sold and mortgages released, and the proceeds thereof having been accepted, and the oral agreements executed and acted upon, is sufficient to take the case out of the statute of frauds.

In fact, it is too well settled to admit of serious doubt that agreements, whether oral or partly oral only, when once executed, are binding on all parties thereto. As formerly stated, the old note, although in Wade's possession, is treated and recognized, not as evidence merely, but as having sufficient life to continue the mortgages in force and to entitle respondents to maintain this suit for their foreclosure, but for all other purposes are treated as extinguished, for, if available only as evidence of the existence and effect of the mortgages, it is to no purpose, as it could only tend to prove an intent to revive a canceled instrument, for which purpose it would be insufficient. In this connection it must be remembered that this is not an action on the notes, but a suit to foreclose the mortgages.

It is urged by counsel for Mrs. Sturgis that, as she did not file this suit, the statement in our former opinion to the above effect, to use counsel's language, "has been washed away by an avalanche from the record itself." True, she did not bring this suit, and appears only as one of the defendants; but, notwithstanding that feature, she has no interest in common with appellants, and was made a defendant only because of having an interest in the subject-matter involved, and by reason of refusing to join as one of the plaintiffs. Although a defendant, she affirmatively pleads and formally sets up her interests, and makes similar averments and seeks the same relief as the plaintiffs. From this it follows that, whether she be termed a plaintiff or defendant, or whether she joined in the filing of the suit, or subsequently saw proper to move and assert similar rights in the same manner through the same source, is immaterial, and, to say the most in favor of counsel's contention in this respect, is what might be termed a "distinction without a difference." The inconsistency of her position is manifest, whether we say, "for the purpose of bringing this suit," etc., or adjust our statement to what is, in effect, counsel's position on this point, and say, "for the purpose of seeking a decree of foreclosure in her favor she recognizes the old note as having sufficient life to entitle her to foreclose the mortgages for which she recognizes Wade

as her trustee, but considers the note extinguished, and denies Wade's trusteeship for any other purpose."

The transactions shown in this case clearly bring it within the principles announced and recognized in *Coleman v. Stark*, 1 Or. 116; *Wills v. Wilson*, 3 Or. 308; *Swegle v. Wells*, 7 Or. 222; *La Grande Nat. Bank v. Blum*, 27 Or. 215 (41 Pac. 659). And these decisions on the points here involved are in harmony with the great weight of cases in this country, many of which are cited in our former opinion. As is in effect clearly held in *Swegle v. Wells*, "the ordinary rules relating to commercial paper," referred to by counsel for McLeod, cannot apply to such cases; nor can it make any difference that the verdict of the jury in that case, to which our attention is directed, was left undisturbed, as the conclusion here reached is in harmony with the result there, both as to the law and the facts under consideration.

12. Other points upon the merits are urged by counsel for respondents, but all of them, like some we have here re-examined, are discussed in our former opinion, and sufficient reasons are not advanced to entitle them to further consideration. Our attention, however, has been especially directed to the moneys paid to Wade by appellants, concerning which it is maintained that his receipts are insufficient to cancel the indebtedness. In this connection, our attention is called to the "Wade-Despain Trust Account," by reason of which it is claimed that an agency is shown between Wade and defendants; that it shows a deposit to the credit of that account of \$46,313.78 and a payment to the owners of the new notes of but \$18,650; that this account discloses \$7,000 yet due on the McLeod note, and \$1,157.45 on the Sturgis note; and that the balance of the deposits was applied in payment of interest on the notes, taxes and insurance for defendants, including moneys paid to the Berkeleys and Despains, and in the cancellation of a certain note and mortgage on defendants' property in Union County, showing disbursements from this fund of \$1,501 more than received. The fallacy in this contention lies in assuming that appellants are bound by everything shown by the books and checks relative to the Wade-Des-

pain Trust Account. This account was adopted by Wade after he had entered upon his duties as trustee for the holders of the new notes, and was merely a method adopted for his own convenience, over which appellants had no control. The money was paid to Wade, out of which certain sums were to be first paid, such as the \$150 per month to Mrs. Despain and payment of taxes, etc., in accordance with the understanding of all; but it was immaterial to her, as well as to the other appellants, as to how the account was kept in the bank after having been paid to the party entitled to receive it. All in excess of the sums to be expended under the written agreement was paid to him for the purpose of reducing the principal and interest on the indebtedness covered by the mortgages, and was under the control of Wade only. He held the mortgages and original note, neither of which was extinguished until fully paid. Appellants, accordingly, paid the money to the holder of the legal title thereof, and it was not incumbent upon them to see that it was credited on the proper instrument: *Swegle v. Wells*, 7 Or. 222; *Hatfield v. Reynolds*, 34 Barb. 612.

The question as to the application of moneys received on the debt when collected by Wade became a matter between him and respondents only, and, if applied as it should have been, the debt was canceled, while, if not so applied, the effect, so far as the same may affect appellants, must be determined according to, and under, the well-known maxim that "equity looks upon that as done which should have been done," which would entitle the notes and mortgages to cancellation. In respect therefore to this account, it was opened by Wade as a trustee, and he thereby became the depositor, and, as such, alone had authority to draw upon it. A large part of the money deposited to the credit of this account is shown to have been paid to him by check, which checks were made payable to his order as trustee. The money therefore paid to and received by him was received in his trust capacity, and, so far as any part thereof was paid to appellants or disbursed on expenses of the trust, they are properly chargeable, but, so far as not thus paid, are chargeable against respond-

ents. The books, statements, etc., showing the condition of the account, constitute admissions against his interest as trustee, and as such, were properly admitted in evidence for the purpose of showing the payments to him to be applied on appellants' indebtedness, for which they are accordingly entitled to credit thereon to the full amount of the sums shown by this account, as well as those disclosed by any other statements or receipts to have been received by him, in excess of disbursements made to and for them under their agreement. The moneys therefore drawn from this account, which are properly chargeable to the appellants, are the sums paid to Mrs. Despain for her support, to the Berkeleys, for collecting rents and for taxes, insurance, repairs, etc., amounting to \$17,756.50.

After a careful re-examination of the accounts, statements, deposit books, etc., showing receipts and disbursements by Wade, under his trust, we find the sums for which respondents are chargeable to be as follows:

June 29, 1898, 8 notes payable to Wade as trustee, aggregating	\$29,500.00
Interest on same to December 30, 1904, date of last credit	13,422.50
Aggregate amount paid to N. E. Despain.....	8,500.00
Amount paid to Norborne Berkeley.....	1,470.75
Amount paid to C. Berkeley	129.35
Amount paid for insurance, taxes, repairs, etc.....	4,644.04
Aggregate interest on last four sums (approximate)	3,425.00

Total\$61,091.64

Moneys received by Wade, as trustee, from appellants and their agents are as follows:

Between July 29, 1898, and September 11, 1903, cash from Snyder	\$13,685.69
July 18, 1898, cash from LaFontaine.....	5,500.00
March 7, 1899, paid to C. B. Wade from sale of Grande Ronde ranch	8,000.00
March 30, 1899, from sale of other property.....	3,500.00
September 4, 1899, cash from Campbell from sale of land	302.00
September 8, 1903, cash from Florence Berkeley....	1,408.00

December 8, 1903, cash from Peringer.....	1,050.84
Aggregate amount of interest on these payments from date of each thereof	11,414.80
Total amount of rents collected.....	17,756.50

Total credits\$62,617.83

It will be observed, therefore, from the statements, books, etc., introduced in evidence, that Wade, as trustee, received from appellants and for respondents, to be applied in the payment of the instruments secured by the mortgages, about \$1,200 more than sufficient for the cancellation thereof.

It is urged, however, that the item of \$3,500 was a loan to Wade by appellants, and that they should not be credited with this item; but we find nothing in the record to justify this inference, nor is there anything in the statement made by Berkeley to Hartman, testified to, when considered in connection with Berkeley's explanation thereof, to justify such conclusion. In fact, the receipt itself, which it is conceded was given for the money, is sufficient to rebut counsel's theory, it being as follows:

"Pendleton, Oregon, Mch. 30, 1899.

Received from the Despain Estate on account of Wade trustee mortgage, against the estate property, thirty-five hundred dollars to be applied on notes in final settlement—interest in accordance with terms of mortgage.

C. B. Wade, Trustee."

13. It is also contended that the \$8,000 received from the sale of the Grande Ronde ranch should not be applied on respondents' claim. This again overlooks the legal effect of the agreement by which Wade was made the holder of the legal title to the Teal note and mortgages which were not to be deemed canceled until the entire amount represented therein should be paid. The evidence discloses that this land was sold and deeded to Wade by the Despains for the consideration of \$8,000 over and above the mortgage liens thereon, under an express agreement that this sum should be applied on the mortgage indebtedness held by him against them, and that the deposit books of the Wade-Despain Trust Account show that he received this money

from them, placing it to the credit of this fund. This transaction was the same in effect as if the Despains had sold the farm, subject to the mortgage, to any other person, and paid the \$8,000 received therefor to Wade on the mortgages, and he, in place of paying it to respondents under his trust, had loaned it to the purchaser, or to any other person with which either to cancel the lien on the farm sold or for any other purpose. In short, the question as to what he may have done with this or any other fund received from appellants for application on the mortgage indebtedness became, under the record herein, a matter for adjustment between the respondents and Wade, as their agent, and could not, as a matter of law, concern appellants.

Under any construction that may reasonably be applied to the evidence, as well as from any inference that may logically be deduced from the record, it appears that more than sufficient funds have been paid to the party lawfully entitled to receive them for the cancellation of the indebtedness.

It follows that the petition for rehearing should be denied.

REVERSED: REHEARING DENIED.

Argued 16 April, decided 11 June, 1907.

BORING LUMBER CO. v. ROOTS.

90 Pac. 487.

LOGGING—CONTRACT FOR SALE OF STANDING TIMBER.

1. A contract for the sale of standing timber, indefinite by its terms as to how the timber shall be moved or at what place on the tract, becomes definite by the subsequent acts of the grantee, and the locations so established are as binding as if fixed by the parties originally.

SAME—DAMAGES FOR INTERFERENCE.

2. Where a right, as, for example, to cut and remove standing timber, has become vested at a particular point by the action of the parties, neither the grantor nor any one acting under him can interfere without incurring a liability for damages—and it is not a defense to show that the right of removal might have been exercised equally as well at other points.

RAILROAD—CONTRACT FOR RIGHT OF WAY—RIGHT OF ENTRY.

3. A contract agreeing to convey a right of way within a time specified, with the right to enter on the property described, does not confer an immediate right of entry.

LOGS—CONTRACT—PROOF.

4. A party must prove the allegations or claims on which he relies,

and if rights are conditional, he must prove a compliance with the condition.

A buyer of standing timber under a contract limiting the time for its removal, who relies on an extension of the time for the removal of the same, pursuant to a subsequent contract granting the extension of time on a specified condition, must establish performance of the condition before he can rely on the subsequent contract.

PLEADINGS AND PROOFS IN LAW ACTIONS.

5. Parties litigant should not forget the rule of pleading that proofs must correspond to and be limited by the claims stated in the written pleadings, and rights beyond those thus asserted cannot be granted in law actions.

Where a buyer of standing timber under a contract limiting the time for its removal alleges in his complaint, in an action for the seller's breach of contract, that he was allowed the time specified in the contract for the removal of the timber, without pleading any modification of the contract, he cannot rely on a subsequent contract extending the time for the removal.

LICENSE—DAMAGES FOR INJURY BY TRESPASSER.

6. A licensor is not liable for damages caused the licensee by the unauthorized acts of trespassers.

An owner sold standing timber on his premises, and gave the buyer the right to remove the same within one year. Before the expiration of the year, he agreed to convey to a railroad company a right of way. The contract did not give the company the right to enter on the premises, but the company, before the expiration of the year, did enter on the premises and interfered with the buyer's method of removing the timber. *Held*, that the buyer could not, for the damages sustained, maintain an action against the owner, but his remedy was against the company.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. COMMISSIONER SLATER.

The Boring Junction Lumber Co., as the assignee of O. A. Palmer, sues J. W. Roots to recover damages for breach of a contract made by defendant with Palmer for the sale of saw timber on the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 1 township 2 S., range 3 E., and on other lands adjacent, all in Clackamas County, with the right to remove the same within one year from June 28, 1902, the date of the contract. The breach alleged is that thereafter, and before April 1, 1903, defendant sold and conveyed a right of way for an electric line and other railroad across the 80 acres above described without making any provision for the removal of the timber thereon to plaintiff's sawmill, and that "the railroad company" entered upon the land and built a railroad on a high embankment without any provisions for the removal of plaintiff's timber to plaintiff's sawmill; that the build-

ing of the road on the right of way, as the defendant authorized it to do, made it necessary for plaintiff to build, and plaintiff did build, tunnels under the railroad and through the embankments to enable it to remove its timber to its sawmill. For the expense of building these tunnels, as well as for the extra expense of having to take its logs through the tunnels and for loss of timber, which it was not able by reason of the delay occasioned by the building of the tunnels to take off within the one year allowed by the contract of sale, plaintiff claims damages.

Defendant answered, denying all of the allegations of the complaint, except that he admits owning the land described, and that he made the contract with Palmer for the sale of the timber. There are also three separate affirmative defenses alleged, of which the first two need not be mentioned. The third defense is to the effect that the right of way mentioned was not granted by defendant until after the time provided in the contract for the removal of the timber had expired, and that any and all grants made by him to "the railroad company" were made by quitclaim deed only, and the purchaser took the same with full knowledge of and subject to all rights and equities acquired by said O. A. Palmer or his assigns in and to the lands or timber by reason of his contract; that plaintiff was damaged, if at all, by the acts of the railroad company and not by the acts of the defendant. The reply put in issue all of the material allegations of the answer.

The cause was tried before the court without a jury, and, among others, the following findings were made:

"(3) That on June 28, 1902, the defendant agreed in writing to sell certain saw timber in the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 1, to one O. A. Palmer for a valuable consideration, which consideration was afterwards paid. That said contract did not give a right to remove said timber in any particular direction nor to any particular place, or mention how or to what place the timber was to be removed. That, under said contract, said O. A. Palmer was to begin removing said timber on said portion of section 1 first, and continue thereon until removal was completed. Then he was to remove the timber from the other of said tracts purchased in the order in said contract specified. * *

(5) That defendant did not before April 1, 1903, nor at any time while plaintiff had any rights therein, sell or deed by a proper conveyance a right of way for a railroad across the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section 1.

(6) That on July 10, 1902, said Roots and said Portland City & Oregon Railway Co. did enter into a written agreement whereby, in consideration of the building of the railway across his lands, defendant was to give them a right of way over said section 1. That such agreement contained no covenants or rights of entry, but only bound defendant on the performance of certain conditions therein expressed within one year from date to give it a deed to a right of way across his lands. That the evidence failed to show that the conditions precedent in said agreement were ever complied with, or that said railroad company was ever entitled to a deed thereunder. * *

(8) That in July, 1903, the Oregon Water Power & Railway Co. got a quitclaim deed to a right of way across defendant's said land, but the same in no way refers to, nor does it appear to be responsive to, the contract to the Portland City & Oregon Railway Co., and is not a copy of the deed there agreed to be made, and is given after the contract right to the timber given to O. A. Palmer on this 80 acres in section 1 had expired. * *

(11) That in March, 1903, the Oregon Water Power & Railway Co., successors to the Portland City & Oregon Railway Co., began building its line across the said land of defendant and found plaintiff in possession thereof, removing the timber and with skidroads across the proposed right of way. * *

(12) That the contract of July 10, 1902, did not give the said railroad company right to enter upon said lands and interfere with plaintiff in removing the timber purchased under the contract of June 28, 1902."

From these the court made, among others, the following conclusions of law:

"(2) The quitclaim deed given to such right of way by J. W. Roots in July, 1903, after plaintiff's right, if any, in said lands had expired, caused no damage to plaintiff.

(3) That the contract of July 10, 1902, between J. W. Roots and the Portland City & Oregon Railway Co., did not give the electric railroad company any superior right to the plaintiff in possession under contract of June 28, 1902, and said company could not oust plaintiff by reason of any authority given it by defendant in said contract.

(4) That plaintiff was damaged, if at all, by its own act in surrendering to one without right or only an inferior one.

(5) That said contract of July 10, 1902, did not authorize said company to interfere with plaintiff in removing the timber under contract of June 28, 1902.

(6) That the said contract of July 10, 1902, gave no right of immediate entry and the entry of the Oregon Water Power & Railway Co., so far as plaintiff was concerned, was a trespass.

(7) That since the contract of June 28, 1902, gave to the purchaser no right to take timber in any particular direction or to any particular place, and there were other equally accessible directions and places open to plaintiff over and to which the timber could have been removed, there was no damage to plaintiff because the road in the direction complained of was not left open."

Plaintiff objected to each of the foregoing findings, except finding No. 11, as contrary to the evidence, and to each of the conclusions of law; but, the court having overruled plaintiff's objections, judgment was entered in favor of defendant, from which plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Ralph Roloeson Duniway*.

For respondent there was a brief with oral arguments by *Mr. Charles Henry Dye* and *Mr. Harvey Edwin Cross*.

Opinion by MR. COMMISSIONER SLATER.

The correctness of the findings of fact and conclusions of law herein must be determined in the main by the proper legal construction to be placed upon the written contracts of the parties, namely, the contract of June 28, 1902, between defendant and O. A. Palmer for the sale of the timber, and that of July 10, 1902, between defendant and the Portland City & Oregon Railway Co. for a right of way through defendant's premises.

The second and third findings of fact are unquestionably supported by the evidence. It would have relieved the case, however, of much confusion and perplexity, if the written contracts made by the parties had been inserted in full in the findings, leaving the legal effect thereof to be stated in the conclusions of

law. As it is, there is much confusion of matters of fact with conclusions of law. Plaintiff contends that the court should have found that defendant, by his contract of June 28, 1902, gave to Palmer and his successor a license to remove the saw timber to the sawmill on "the land lying east of the center of the county road, and running about north and south through the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 1, township 2 S., range 3 E.," instead of finding, as it did in the third finding, "that said contract did not give a right to remove said timber in any particular direction nor to any particular place, or mention how or to what place the timber was to be removed." And in connection therewith, plaintiff claims that conclusion of law No. 7 is erroneous. We shall consider them together.

1. It is conceded, however, by plaintiff's attorney in his brief that the contract mentioned does not in express terms grant a license to take the timber off in any particular direction or to any particular place, but he argues that the contract contains no restriction as to where or in what direction the timber is to be removed, and that the parties, by their acts subsequent to the making of the contract, fixed and located the place and direction of removing the timber. This is undoubtedly correct, and the court has by the third finding substantially found that there was no restriction as to where or in what direction the timber was to be removed; and it also found in the eleventh finding that, when the railroad company began building its line across the said land of defendant, it found plaintiff in possession thereof, removing the timber and with skidroads across the proposed right of way. This latter finding, taken in connection with finding No. 3, concedes all that plaintiff can rightfully claim, and is sufficient for the purpose of establishing plaintiff's right as claimed by it to exercise its license at and across defendant's land where the right of way intersected its skidroads. It is not material to what point beyond the right of way plaintiff may have taken his logs. The place of exercising the license granted was not fixed by the contract, but was afterwards determined by the parties, and such location thereof became binding on them the same as if it had been fixed in the contract in the first in-

stance: *Curtis v. La Grande Water Co.* 20 Or. 34 (23 Pac. 808, 25 Pac. 378; 10 L. R. A. 484). From this it must necessarily follow that conclusion of law No. 7 is erroneous, and cannot be sustained, for the licensee had built its skidroads and was using them for the purpose expressed in the granted license without objection by the licensor. The right became vested at the point of user.

2. If this right was interfered with during the term of the license by the licensor, or by any one acting under his authority, it is no answer to an action therefor to say that there were other equally accessible directions and places open to plaintiff, over and to which the timber could have been removed, and that there was no damage to the plaintiff because the road was not left open in the direction complained of.

3. Plaintiff's objections to the remaining findings, so far as they may be material to a decision of the case, are covered by the terms of the defendant's so-called contract of July 10, 1902, with the Portland & Oregon Railway Co. This instrument is signed only by the defendant, with two witnesses, and is acknowledged in the same form as a deed. In effect, it purports on its face that, in consideration of \$1 paid to him by the Portland City & Oregon Railway Co., and in consideration of the advantages of the location of its line through and upon his land, he agrees with the company at any time within 12 months from that date to execute a deed, the form of which is set out at length in the contract, containing a prospective grant of a right of way across defendant's lands, in consideration of the location of a railway through and upon his lands and the advantages which may accrue to him therefrom. But it is evident by the very words of the contract that none of the terms of the proposed deed were intended to become effective, as granting any rights, until it had been executed. It is not a contract by the defendant saying to the company that "when you locate and build the road on my land, and in consideration thereof, I will execute the following deed," from which language an implied right of entry might be derived; but it is a contract that for the consideration of \$1, and the advantage of the location of its line through and

upon his property, the defendant agrees to execute a deed within 12 months, which, by its express terms, is to grant a right of way "with the unrestricted right and privilege to enter upon, locate and construct their railway," etc. This expressly negatives any implied right in the company arising out of this contract to enter upon the land for the purpose of building a railroad prior to the execution of the deed. In this respect the sixth finding is more favorable to plaintiff than the facts justify; but, taken in connection with finding No. 12, the true legal effect of the contract in our judgment is correctly stated.

4. Nor does the record disclose that defendant at any time before June 28, 1903, the date of the expiration of the year in which plaintiff was to remove the timber therefrom, had made any contract or conveyance granting a right of way to any one over the lands in question, so that finding No. 5 must be in accord with the evidence. Plaintiff, however, contends that on December 30, 1902, it was granted by defendant an extension of time, amounting to one year, in which to take off the timber, and the record does contain a writing signed by defendant to that effect, but it is conditional, not absolute. The condition is "in case O. A. Palmer keeps operating the mill at Boring Junction under his contract with F. S. Morris." This is a condition precedent, and there is no evidence in the record that the condition was complied with so as to make the extension effective.

5. A more serious objection, however, to the consideration of this evidence is that plaintiff has alleged in the complaint that he was allowed one year only by the defendant by the contract of June 28, 1902, in which to remove the timber, and it does not plead any modification thereof, so that plaintiff is bound by its pleading to the one year limitation alleged.

6. On July 11, 1903, defendant and his wife, for the expressed consideration of \$1, quitclaimed unto the Oregon Water Power & Railway Co., successors to Portland City & Oregon Railway Co., a strip of land 100 feet wide, being 50 feet in width on each side and parallel with the center line of the main track of the railway, as the same was then established and constructed, upon, over and across defendant's land, but the date of the ex-

execution of this instrument is after the expiration of plaintiff's contract, and when all of its rights thereunder had ceased to exist, and hence the execution thereof by defendant could not in any event have been a violation of his contract with plaintiff. The entry, therefore, in March, 1903, of the Oregon Water Power & Railway Co. upon defendant's land then in the possession of plaintiff under its license, as found by the court, and the building by the railroad company of the embankment complained of, was, as against plaintiff, an unauthorized trespass, for which defendant was not liable; but plaintiff is bound to protect its own rights, and neither party is liable for the infringement of the rights of the other by the acts of a trespasser: 18 Am. & Eng. Enc. Law (2 ed.), 1135.

These legal deductions having been correctly and substantially found and stated by the court in conclusions 1 to 6 inclusive, and disregarding the seventh, which is erroneous, and the eighth and ninth, which are immaterial, the findings are sufficient to support the judgment, which necessarily should be affirmed.

AFFIRMED.

Decided 20 August, 1907.

DAVIDSON v. COLUMBIA TIMBER CO.

91 Pac. 441.

APPEAL—TIME FOR FILING TRANSCRIPT—EFFECT OF STIPULATION.

1. The filing of the transcript within the time allowed by law, or an extension thereof properly obtained and entered of record before the expiration of the time previously allowed, is jurisdictional and its omission cannot be excused. A stipulation for additional time is not equivalent to an order granting such time.

SAME—ORDER NUNC PRO TUNC.

2. Where no order was granted by the trial judge on a stipulation extending the time for the filing of a transcript on appeal until after the time fixed by law had expired, the court had no power thereafter to grant an order extending such time to the date fixed in the stipulation by directing that the same be entered *nunc pro tunc* as of the date of the stipulation.

Appealed from Columbia County.

Action by E. L. Davidson against the Columbia Timber Co., in which defendant appealed. Respondent now moves to dismiss the appeal. DISMISSED.

Mr. T. J. Cleeton for the motion.

Mr. J. F. Boothe contra.

PER CURIAM. On November 3, 1906, plaintiff recovered judgment against defendant in the circuit court of Columbia County for \$2,400 and costs. Defendant appealed by giving notice in open court at the time the judgment was rendered. The transcript was not filed in this court until April 15, 1907. The parties stipulated in writing for an order extending the time until that date, but no order of the court was made in accordance with such stipulation. The defendant moves to dismiss the appeal.

1. The filing of a transcript within the time allowed by law, or an extension thereof which may be granted by the trial court or judge thereof, or by this court or a justice thereof, within the time allowed to file such transcript, is jurisdictional, and cannot be dispensed with by consent of the parties; nor can the court permit the transcript to be filed after the expiration of the time, whatever reasons may have occasioned the neglect: *Kelley v. Pike*, 17 Or. 330 (20 Pac. 685); *McCarty v. Wintler*, 17 Or. 391 (21 Pac. 195); *Nestucca Road Co. v. Landingham*, 24 Or. 439 (33 Pac. 983); *Connor v. Clark*, 30 Or. 382 (48 Pac. 364).

2. The defendant produced at the hearing and asked permission to file a certified copy of an order of the trial court, made on July 20, 1907, as follows:

"It appearing to the court that on the 20th day of March, 1907, a stipulation was signed by the plaintiff and defendant's attorneys extending the time in which to file a transcript on appeal in the supreme court until April 15, 1907, and it further appearing that no order was entered by the court at that time upon said stipulation, it is now ordered that the time in which to file the transcript in said cause in the supreme court be and the same is hereby extended until April 15, 1907, and it is further ordered that this order be entered on the journal of this court as on March 20, 1907."

This record does not show that an order enlarging the time was in fact made "within the time allowed to file the transcript." It recites the stipulation of the parties, and that no order was entered by the court in accordance therewith, and then continues, "It is now (July 20, 1907) ordered that the time be extended," etc., clearly indicating a previous date, but which the clerk had failed to enter of record, it should be entered as of the date when made. If an order extending the time in which to file the transcript had actually been made, but not entered of record, it would have been proper for the court to have directed an entry *nunc pro tunc* as of the proper date; but it had no authority to make such an order after the time for filing the transcript had expired, and direct it to be entered as of a previous date. An extension of time in which to file a transcript must be secured before the time has expired. *Tallmadge v. Hooper*, 37 Or. 503 (61 Pac. 349, 1127).

It follows that we have no alternative but to allow the motion, and it is so ordered.

APPEAL DISMISSED.

Argued 2 July, decided 16 July, 1907.

McCOY'S WILL.

DENNING v. MCCOY.

90 Pac. 1105.

LAST WILL—PRESUMPTION OF REVOCATION FROM POSSESSION BY TESTATOR—BURDEN OF PROOF.

1. Where a will is shown to have been executed and was last seen in the possession of the testator, its subsequent disappearance raises a strong presumption that the testator destroyed it as a method of revocation, and the burden of proving that it was not destroyed naturally rests on the proponent.

LAST WILL—EVIDENCE OF DECLARATIONS OF TESTATOR.

2. In a proceeding to establish and probate a lost will, declarations of the testator, whether indicating an intention not to adhere to the will as his will, or indicating an intention to adhere to it, are admissible.

From Douglas. JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a proceeding to establish and probate a lost will. In the spring of 1900 J. J. McCoy made and executed in due form

of law his last will and testament. He died on the 9th of January, 1904, leaving real and personal property of the probable value of \$3,000. After diligent search it was impossible to find his will, and on March 25, 1904, Snow Denning, one of the heirs, filed a petition in the county court to establish such will and for an order admitting it to probate, alleging that it had not been revoked but was in full force and effect at the death of the testator. The other heirs (Wm. A., John H. and S. D. McCoy) joined issue on the averments of the petition, and upon evidence taken in the county court a decree was rendered establishing the will, from which an appeal was taken to the circuit court, where the decree of the county court was reversed and the cause dismissed. From this decree Mrs. Denning appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Dexter Rice*.

For respondents there was a brief over the names of *W. F. Benson* and *James Owen Watson*, with an oral argument by *Mr. Watson*.

Opinion by MR. CHIEF JUSTICE BEAN.

The will sought to be established and probated in this proceeding was prepared by Judge Fitzhugh in lieu of a former will, and was executed in his office and witnessed by A. C. Marsters and H. W. Miller. It has never been seen since its execution, so far as the record discloses, and Fitzhugh, Marsters and Miller are the only persons who know anything about its deposition. There is an apparent conflict in their testimony as to whether it was left with Fitzhugh by McCoy after it was executed, or taken away by him; but we are clearly of the opinion, from a great preponderance of the evidence, that when last seen it was in the possession of McCoy. Fitzhugh testifies that he does not know what was done with the will; that McCoy took it with him when he left the office, and as the first will had been deposited in the bank he supposed the same was done with the second; that he, witness, kept all important papers, such as

deeds, wills and mortgages, locked in a safe in his office to which no one had the combination but himself; that a few months after the will was executed he vacated his office and took all the papers from his safe to his residence, where they were at the time he testified, except such as he had delivered to parties entitled thereto; that he had made diligent search among his papers for the McCoy will, and could not find it, and is satisfied he never had the will after it was executed; that some time before McCoy's death Denning, the husband of petitioner, told him that McCoy said his will was in his possession; that he thereupon made diligent search among his papers but could not find it, and sent word by Denning to McCoy to come to his house and he would convince him he did not have the will; that he met McCoy a short time afterwards, but he did not say anything about the will as witness expected him to do.

Marsters says that the will was in Fitzhugh's office when he left, but Miller testifies that Marsters left the office before McCoy. Miller says that he and McCoy went out of Fitzhugh's office together, and that the will was left there, but it does not appear that his attention was particularly called to the matter or that anything was said about the custody of the paper, and he does not testify that it was left with Fitzhugh for safe-keeping. His testimony is simply his recollection of a matter occurring some four years prior to the time his testimony was given, without there being anything in the transaction to call his attention to that particular feature. Fitzhugh, on the other hand, is quite positive that the will was not left with him, but that McCoy took it away, and in this he is corroborated by the fact that it cannot be found among his papers or in the place where it would probably be if in his possession, and by the further fact that McCoy did not leave the first will with him, although it was prepared by him and executed in his office, but deposited it in the bank as he would be likely to do with the second.

1. It must, we think, be taken for granted, therefore, that the will when last seen was in the custody of the testator, and since it could not be found after his death a legal presumption

is raised that it was destroyed by him with the intention of revoking it, and the burden of proof is on the proponent to overcome this presumption: 1 Redfield, Wills, *330; Rood, Wills, § 356; Thornton, Wills, § 56; *Ewing v. McIntyre*, 141 Mich. 506 (104 N. W. 787); *Williams v. Miles*, 68 Neb. 463 (94 N. W. 705, 96 N. W. 151; 62 L. R. A. 383; 110 Am. St. Rep. 431). This presumption is said, by the Supreme Court of New York, to be a strong one and to stand in the place of positive proof: *Collyer v. Collyer*, 110 N. Y. 486 (18 N. E. 110; 6 Am. St. Rep. 405). It is, however, but a *prima facie* presumption, and may be overcome by circumstances or other proof to the contrary.

2. For this purpose declarations of the testator are competent evidence: *Miller's Will*, 49 Or. 452 (90 Pac. 1002). But evidence of declarations by the testator that he had destroyed his will or indicating an intention not to adhere to it is also competent to strengthen and fortify the presumption which the law attaches to the fact that the will cannot be found. "Whether it be the making of a will, or the destroying of one," said the Supreme Court of Ohio, "the competency of the testator's declarations as evidence is alike in each case and for the same reasons admissible": *Behrens v. Behrens*, 47 Ohio St. 323 (25 N. E. 209; 21 Am. St. Rep. 820).

Now, there is evidence on behalf of proponent of declarations of the testator made to the petitioner and her husband and other witnesses, after the execution of the will, which indicates an intention to adhere to it, and which tends to show that he did not mean to revoke it; but the force of this evidence is overcome by proof of positive declarations by the testator made to his wife and other members of his family that because of some real or fancied grievance against petitioner's husband he had, in fact, destroyed and revoked the will, and intended that his heirs should share and share alike in his estate. It is not necessary to state the evidence in detail; but it is sufficient to say that in our opinion the presumption, which the law attaches to the fact that the will cannot be found, has not been overcome by proponent.

The decree of the court below is therefore affirmed.

AFFIRMED.

Argued 17 April, decided 11 June, 1907.

HARVEY v. DEEP RIVER LOGGING CO.

90 Pac. 501.

CARRIERS—DUTY TO PERSON VOLUNTARILY CARRIED—FARMS.

1. One not a common carrier who voluntarily undertakes to transport another is responsible for injury to him resulting from negligence, whether the service was for a compensation or gratuitous.)

CARRIERS—IMPLIED AUTHORITY OF TRAINMEN.

2. Employees operating transportation appliances, such as engineers or conductors, cannot by virtue of their employment impose the liability of a carrier on their employer by permitting strangers to ride on their conveyances.)

CARRIERS—EVIDENCE OF CUSTOM TO CARRY PASSENGERS.

3. Testimony that the operating employees of a logging road using engine and trucks, and not engaged at all in the passenger business, were in the habit of permitting persons to ride thereon from point to point, and that such practice was open, long continued and notorious, and was within the actual knowledge of the manager, reasonably tends to show that the owner of the road expressly or impliedly consented to allowing persons to be so carried, thereby establishing the relation of passenger and carrier as to any person so carried.)

CARRIERS—CONTRIBUTORY NEGLIGENCE BY RIDING IN EXPOSED POSITION.

4. One riding with the implied consent of a logging company on its logging train, consisting of an engine and a logging truck, is not guilty of contributory negligence *per se* in riding on the truck, which was the place where persons usually rode.

CARRIERS—RISKS ASSUMED BY PASSENGER.

5. One riding on the logging train of a logging company, with its implied consent, does not assume the risk of collision through its negligence with another of its trains, though he does assume the risks incident to the proper operation of that kind of a train.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by James F. Harvey against the Deep River Logging Co. Judgment for plaintiff. Defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Coovert & Stapleton*, with an oral argument by *Mr. Elmer E. Coovert*.

For respondent there was a brief over the name of *Gammans & Malarkey*, with an oral argument by *Mr. Dan J. Malarkey*.

Opinion by MR. CHIEF JUSTICE BEAN.

This is a personal injury case. The defendant is a corporation engaged in the logging business in the State of Washington, and, as a part of its appliances, owns and operates a logging

steam railroad from a landing on Deep River to its logging camp, a distance of about four miles. The equipment of the road consists of three engines and the necessary logging trucks. A logging truck is a platform about six by ten feet in size, supported by four wheels, upon which one end of a log rests while being hauled; the other end resting upon a similar truck. The defendant has no passenger coaches or cars, and is not engaged in the carrying of passengers; but it was a custom to send an engine and one or more of its logging trucks to the landing three or four times a week for freight and supplies, and any person desiring to ride was permitted by the employee in charge of the train to get in the engine cab or on the car, and be carried from point to point without the payment of fare. The evidence tended to show that this practice prevailed generally from the time the road was completed until the injury to the plaintiff, a period of three or four years.

On September 1, 1904, the manager of the company sent a train, consisting of an engine and one flat car, or truck, in charge of an engineer, to the landing to get his wife and children and some freight belonging to the company. When within 200 or 300 yards of the landing, the train passed the plaintiff, who is an itinerant vender of goods, and three or four other persons who were waiting to go out to the camp, and the plaintiff inquired of the engineer if the train would stop at that point on its return. The engineer, in reply, told him it would not, and if he wanted to go to the camp he must get on the car there, and stopped the train for that purpose. The plaintiff and the other persons thereupon boarded the flat car, and the train proceeded to the landing, where some freight was put on the car, and the superintendent's wife and children and another lady got in the cab of the engine to ride to the camp. The train then started back, stopping about 500 yards from the landing to take aboard some section hands and their car, and while passing around a sharp curve in the road it suddenly came into collision with another train loaded with logs, which had been carelessly and negligently permitted to leave the camp. The

plaintiff was thrown from the car and seriously injured, and brings this action to recover damages therefor.

In his complaint he alleges that for some time prior to the injury defendant customarily and habitually carried passengers and persons on its trains, and that on September 1, 1904, he desired to go and be carried from the river terminus of the defendant's railroad to its logging camp, and for that purpose got aboard and took passage on one of its trains in good faith, by the invitation and permission of defendant's agents and employees, and was by such persons accepted and received as a passenger on such train. The answer, after denying the allegations of the complaint, sets up affirmatively that plaintiff fur- tively and negligently got on board one of defendant's logging trucks, and was riding thereon at the time of the injury, without permission or consent of the defendant. After plaintiff rested his case, the defendant moved for a nonsuit, which being over- ruled, it gave evidence in support of its defense, and the jury rendered a verdict in favor of the plaintiff. From the judg- ment rendered therein, the defendant appeals, alleging as the only error the overruling of its motion for a nonsuit.

1. The position of the defendant is that plaintiff was not a passenger at the time of his injury, but at most was a mere licensee, to which it owed no duty, except not to willfully or wantonly injure him. It is clear that plaintiff was not entitled by law to be carried on defendant's train. It was not a common carrier of passengers, nor engaged in that business. It could therefore have lawfully refused to carry him, and to have used force, if necessary, to remove him from the car. If, however, it did not do so, but expressly or impliedly authorized or empow- ered the person in charge of the train to permit him to ride thereon, it must be held responsible for negligence or want of care in his transportation: *Simmons v. Oregon Railroad Co.* 41 Or. 151 (27 Am. & Eng. R. Cas., N. S. 896: 69 Pac. 410, 1022); *Wagner v. Missouri Pac. Ry. Co.* 97 Mo. 512 (10 S. W. 486: 3 L. R. A. 156). The fact that no fare was required or paid cannot affect its liability, for, as said by Baron PARKE: "One who undertakes to provide for the conveyance of another

is responsible, although he does so gratuitously": *Lygo v. Newbold*, 23 L. J. Excheq. (N. S.) 108, 110.

2. The only question, then, is whether there was evidence tending to show that plaintiff was being carried by the express or implied consent of the defendant company. The engineer or person in charge of the train had no authority, by virtue of his employment alone, to bind it by accepting plaintiff as a passenger, or by permitting him to ride on the train. The defendant is not engaged in the passenger business, and its trainmen cannot impose the duties and liabilities of that business upon it without its consent.

3. There was evidence tending to show that from the time the road was built to the date of the accident, a period of about four years, it was the habitual custom and practice, known to and acquiesced in by the manager and officers of the defendant, for the engineers or persons in charge of its trains to permit persons desiring to go from one point on the road to another to ride in the engine cab or on the flat car when the train was not hauling logs, and that plaintiff was riding in pursuance of this custom or habit. Heilin testified that his house was near the defendant's road; that he often saw trains going back and forth; that it was, and had been for three years or more prior to plaintiff's injury, the habit and custom for persons other than employees of the company to ride on the train when it was not loaded with logs; that he himself had often so ridden without objection from the company or any of its officers or agents; and that he never heard of them making any objections to persons other than employees being carried on the trains prior to plaintiff's injury. Mathison, who also lives near the road, testified that he had been familiar with the operation of the road ever since it had been built; that he had ridden on the trains many times without objection, and with the full knowledge of the defendant's manager and other officers, and without objection from them; that it was and had been the custom and practice to allow anybody to ride on the train; that the company's manager and other officers knew that people generally

were in the habit of riding thereon; that when the logging camp was in operation the company sent trains down to the landing three times a week to meet the steamer from Astoria; that passengers who came in on the steamer and desired to go to the camp were always permitted and allowed to ride on the flat cars or in the engine cab. Lund, the engineer in charge of the train on which plaintiff was riding at the time of his injury, testified that he had been at work on the defendant's road for about three years; that, while its manager had told him several times to "chase people off" the train, he had never put any one off; that persons living at the camp and along the road, and other persons, not employees of the company, were allowed to ride by him; that the manager often rode on such trains with other persons without objecting to his carrying passengers; that three times a week a train would go down to the landing and meet the boat from Astoria, and travelers coming in on the boat were always allowed to ride up to the camp on the train, and he supposed the manager knew of the practice.

This evidence tends to show that the manager of the defendant company not only had actual knowledge that the engineers and persons in charge of its trains were in the habit of permitting passengers to ride thereon, but such practice was so open, notorious and continuous that it is hardly probable that such practice could have been carried on without his knowledge. There was evidence, therefore, tending to show that plaintiff was lawfully riding on the train by permission of the defendant company at the time of his accident, and it therefore owed to him the duty of not injuring him by its negligence.

4. And he was not guilty of contributory negligence *per se* in riding on the platform or truck: *Gray v. Columbia Cent. R. Co.* 49 Or. 18 (88 Pac. 297); *Wagner v. Missouri Pac. Ry. Co.* 97 Mo. 512 (10 S. W. 486; 3 L. R. A. 156).

5. He undoubtedly assumed the risks naturally incident to the character of the train and its equipment; and, if it was managed with the care requisite for such a train, it is all he had a right to demand or expect: *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373; *Galena & C. U. R. R. Co. v. Fay*, 16 Ill.

558, 568 (60 Am. Dec. 323). But he did not assume the risk of injury in a collision with another train caused by the negligence of the defendant company.

The motion for nonsuit was properly overruled, and the judgment will be affirmed.

AFFIRMED.

Argued 16 April, decided 16 July, 1907.

BURNS v. KENNEDY.

90 Pac. 1102.

QUIETING TITLE—FRAUD—EFFECT OF DEED NOT DELIVERED BUT SEIZED.

1. Where a deed has not been delivered, a purchaser from the grantee therein cannot obtain any title, though entirely innocent, since no title whatever passes without delivery. In case of a deed obtained through fraud, yet intended to be delivered, there would still be a delivery, and thereby the title; but without a delivery no title is transferred.

CONCLUSIVENESS OF JUDGMENT IN FORCIBLE DETAINER—QUIETING TITLE.

2. A judgment in forcible entry or detainer does not bar a suit to cancel a deed, to quiet the title or remove a cloud.

ABATEMENT—TRANSFER DURING LITIGATION—SUBSTITUTION OF PARTIES.

3. Under Section 38, B. & C. Comp., declaring that no action shall abate by the transfer of any interest therein if the cause of action continue, a conveyance of his interest by the plaintiff in a suit to quiet title, made during the pendency of the case, does not abate the suit, or require the purchaser to be substituted on the record.

FACTS SHOWING DEED NOT TO HAVE BEEN DELIVERED.

4. Defendant K and wife, having conveyed property to plaintiff, represented that there was a mistake in the deed, whereupon the wife insisted that plaintiff reconvey to her, she agreeing to execute to plaintiff another deed to the property. Plaintiff consented, and proceeded to have the two deeds drawn correcting the mistake. He and his wife executed their deed, but before K's wife would sign hers she asked to take plaintiff's out and read it to her husband, who was then in the building or at the door. Instead of doing so she took it away and had it recorded, and at once conveyed the property to defendant H. Held, that a complaint in a suit to quiet title, charging such facts, affirmatively shows that there was no delivery of plaintiff's deed intended to pass title, consequently no title was obtained by the last grantee or any subsequent purchaser.

From Curry: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by E. B. Burns against Frances M. Kennedy and husband and R. D. Hume to quiet the title to a lot in Gold Beach. There was a decree for plaintiff, and defendant appeals. Plaintiff, being in possession of the lot in question under a lease

and option to purchase did, on February 20, 1902, purchase from the defendant Mrs. Kennedy an undivided half interest therein, and on that day she conveyed the same to him. Thereafter, on May 16, 1902, she came to Burns, claiming that there was an error in the deed, in that it conveyed the whole of the property instead of one-half. The description in the deed was for the whole property, but the covenant of ownership and warranty was for only one-half thereof, and she insisted that Burns reconvey to her and she would execute to him the proper deed, to which Burns consented, and who then and there proceeded to have two deeds drawn—one from himself and wife to Mrs. Kennedy, and one from Mrs. Kennedy and husband to Burns, correcting the description. Burns and wife then and there executed their deed, and before Mrs. Kennedy would sign hers she asked to take the Burns deed and read it to her husband, who was then in the building or at the door, but, instead of doing so, took the deed away and had it recorded, and proceeded at once to convey the property to defendant Hume. The complaint alleges fraud and conspiracy on the part of all the defendants to procure the title from Burns and convey it to Hume, and also alleges want of delivery of said deed by Burns to Mrs. Kennedy, and that therefore the same conveyed no title to Mrs. Kennedy, and prays for the cancellation of said deed and to quiet plaintiff's title. After the demurrer to the complaint was overruled, answers were filed, and, pending trial, a supplemental answer was filed, by which defendant Hume alleges in bar a judgment in forcible entry and detainer in the justice's court in his favor for said property, and, as a second defense, alleges that since the commencement of the suit Burns has conveyed away all his interest therein, to which supplemental answer a demurrer was filed and sustained. Thereafter decree was rendered for plaintiff on the findings, and R. D. Hume appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Robert Harmer Countryman* and *Mr. W. C. Hale*.

For respondents there was a brief over the names of *Hall & Hall* and *Michael G. Munly*, with oral arguments by *Mr. John F. Hall* and *Mr. Munly*.

Opinion by MR. JUSTICE EAKIN.

1. Defendant insists upon the demurrer to the complaint, in that it does not sufficiently allege the conspiracy or fraud, but the complaint is not fatal to the demurrer. It alleges want of delivery of the deed from Burns to Kennedy, which is alone a sufficient ground for recovery. It does allege fraud on the part of Kennedy; and, if the defendant Hume took title with notice of such fraud or of such facts as would charge him with notice, it is also sufficient on the ground of fraud whether there was conspiracy or not, and the facts for such issues are sufficiently alleged. It is only necessary that the intent appear from the facts alleged; and the complaint does set forth expressly the purpose on the part of Mrs. Kennedy to obtain the title from defendant. Mrs. Kennedy's possession of the deed did not make her a trustee, nor amount to a title obtained by fraud. In such a case the title would pass, but here the complaint alleges want of delivery of the deed, and hence no title would pass; and even though Hume were an innocent purchaser for value, yet he would acquire no title. This distinction is clearly stated by Mr. Chief Justice BEAN in *Allen v. Ayre*, 26 Or. 589, 594 (39 Pac. 1). Hence the demurrer was properly overruled.

2. Plaintiff demurs to the supplemental answer. A judgment in forcible entry and detainer cannot bar a suit to cancel a deed, quiet title or remove a cloud, and does not constitute a defense: *Starr v. Stark*, 7 Or. 500; *Hill v. Cooper*, 8 Or. 254.

3. The second defense therein is equally without merit. Section 38, B. & C. Comp., provides:

"No action shall abate * * by the transfer of any interest therein, if the cause of action * * continue."

This section was construed in *Elliott v. Teal*, 5 Sawy. 188 (Fed. Cas. No. 4,389), decided in 1878, in which it was held that, where *pendente lite* plaintiff conveyed all his interest in the subject of the litigation to another, the action should not abate, but be continued in the name of the original plaintiff. The same ruling was made in *French v. Edwards*, Fed. Cas. No. 5,097, under the California statute, and in 1898 Judge

GILBERT, in *Dundee Mortgage Co. v. Hughes* (C. C.) 89 Fed. 182, again construes this section to the same effect. In *Merriam v. Victory Min. Co.* 37 Or. 321, 329 (60 Pac. 997), it is suggested by Mr. Justice BEAN that it is doubtful whether a transfer by plaintiff made *pendente lite* of his interest in the subject of the suit necessitates the substitution of the transferee—citing *Elliott v. Teal*. And in *Culver v. Randle*, 45 Or. 491, 494 (78 Pac. 394), Mr. Chief Justice MOORE cites *Elliott v. Teal* with approval, where the question arose as to such a substitution after judgment for the purpose of appeal. See, also, *Moss v. Shear*, 30 Cal. 467, 475; *Camarillo v. Fenlon*, 49 Cal. 202. We consider, however, that the language of the statute (Section 38) is clear and decisive upon this question, and that the facts stated constitute no defense, and that the demurrer was properly sustained thereto.

4. At the trial Mrs. Kennedy does not testify. Her husband admits in effect that there was an understanding between himself and wife that she should get the deed from Burns and convey the property for an increased price to Hume, with whom he had been negotiating for such sale. Plaintiff's witnesses make it clear that there was no delivery of the deed. The two deeds were prepared then and there while Mrs. Kennedy was present—one from Burns and wife to Mrs. Kennedy, and one from Mrs. Kennedy and husband to Burns. Burns and wife executed their deed, and before Mrs. Kennedy would execute hers she asked to take the Burns deed and read it to her husband, and she would return it at once, and immediately went off with it and had it recorded, and refused to return it. This constitutes no delivery, and she acquired thereby no right or title, nor could she convey any to Hume. It is insisted that in permitting Mrs. Kennedy to take the deed Burns thereby delivered it, and, though obtained fraudulently, it is sufficient to pass title to defendant Hume; but here the two deeds were to be executed and delivered simultaneously. It was not an exchange of property or of purchase, but an exchange of deeds to rectify a mistake, and Burns had no intention of delivering his deed until he obtained the other in exchange, and Mrs. Kennedy's taking up the

deed to read to her husband for verification establishes nothing against Burns. It is said in *Allen v. Ayre*, 26 Or. 589 (39 Pac. 1), to constitute delivery "it is essential that the grantor must consent either expressly or impliedly that the deed shall pass irrevocably from his control." In citing that case in *Tyler v. Cate*, 29 Or. 515, 524 (45 Pac. 803), where it was relied upon as authority upon the point that if the deed was obtained by fraud it would pass the title, Mr. Justice MOORE says: "Such is the law in some cases; for, if the grantor be induced by fraud, or any other means, to voluntarily deliver the deed to the grantee, the act manifests the assent of the grantor to the contract, and passes the title." To the same effect is *Allen v. Ayre*; but this statement has reference to a delivery intended as a delivery, though induced by fraud. But in this case there was no delivery intended as such, and Mrs. Kennedy acquired no title, and she could convey none to Hume, even though he were an innocent purchaser for value without notice. If his grantor had no title he could acquire none: *Allen v. Ayre*, 26 Or. 589 (39 Pac. 1); 1 Devlin, Deeds, § 267; *Henry v. Carson*, 96 Ind. 412, 422; *Everts v. Agnes*, 4 Wis. 356 (65 Am. Dec. 314).

Therefore the decree below is affirmed.

AFFIRMED.

Argued 3 July, decided 16 July, 1907.

HENDERSHOTT v. SAGSVOLD.

90 Pac. 1104.

REMOVING CLOUD—POSSESSION BY DEFENDANT—REMEDY AT LAW.

1. A suit to remove a cloud or to quiet title cannot be brought under Section 516, B. & C. Comp., against one in possession of the property, since then an adequate remedy exists at law by an action of ejectment.

TAXATION—REDEMPTION FROM TAX SALES—EFFECT OF DEED.

2. Under Sections 3124, 3125 and 3127, B. & C. Comp., providing for redemption from tax sales of real property within a fixed time and for the issuing of a deed by the sheriff to the holder of the certificate of tax sale, no redemption can be made in any manner after the tax deed has been issued and by such a deed the grantee acquires all the title held by the former owner.

TAX SALES—REMEDY AGAINST TAX DEED CLAIMANT.

3. Where the proceedings leading up to a tax sale and deed are void, the remedy of the owner is at law, unless he may bring a suit under B. &

C. Comp. § 516, authorizing one claiming an interest in real estate not in the actual possession of another to maintain a suit against another claiming an estate therein to determine conflicting interests.

Statement by MR. CHIEF JUSTICE BEAN.

The plaintiff, H. M. Hendershott, brought this suit against H. L. Sagsvold for an accounting and for permission to redeem from a void tax sale. In 1895 the plaintiff was the owner and in possession of the real property in controversy. It was regularly assessed for state and county taxes that year. The taxes were suffered to become delinquent, and in December, 1896, the property was sold by the sheriff, under a warrant for the collection of delinquent taxes, to one J. K. Marlay, who subsequently assigned his certificate to P. H. Marlay, and on December 12, 1898, the sheriff executed and delivered to him a tax deed. Thereafter Marlay conveyed the property to the present defendant. It is alleged in the complaint that all the proceedings leading up to the tax sale and deed are null and void, because of certain defects pointed out, and that defendant is and has been, since December, 1901, in possession of the property holding under such deed, and that his use and occupation thereof is reasonably worth \$850; that plaintiff is willing to repay all sums paid by him or his predecessors in interest on account of such tax sale. The prayer is for an accounting and for permission to redeem from tax sale, by paying the amount found to be equitably due plaintiff. To this complaint a demurrer was interposed principally on the ground that it does not state facts sufficient to constitute a cause of suit, because it affirmatively alleges that the defendant was, at the time of the commencement of the suit, in possession of the property in controversy. The demurrer was overruled, and a decree entered in favor of plaintiff, from which defendant appeals. REVERSED.

For appellant there was a brief over the name of *Carson & Cannon*, with an oral argument by *Mr. A. M. Cannon*.

For respondent there was a brief over the names of *W. H. Holmes, Horace Brown Nicholas* and *Webster Holmes*, with oral arguments by *Mr. Nicholas* and *Mr. Webster Holmes*.

Opinion by MR. CHIEF JUSTICE BEAN.

1. The statute authorizes any person claiming an interest in real property, not in the actual possession of another, to maintain a suit against another who claims an estate or interest therein adverse to him for the purpose of determining such conflicting or adverse interest: B. & C. Comp. § 516. A suit cannot be brought under this statute when the property is in the possession of another, because in such case there is a plain, adequate and complete remedy at law: *Coolidge v. Forward*, 11 Or. 118 (2 Pac. 292); *Edgar v. Edgar*, 26 Or. 65 (37 Pac. 73); *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004); *Lovelady v. Burgess*, 32 Or. 418 (52 Pac. 25); *Silver v. Lee*, 38 Or. 508 (63 Pac. 882). It is incumbent upon the plaintiff in such a suit to allege and prove, if controverted, that the property is not in possession of another; otherwise he will be relegated to his remedy at law: *Moore v. Shofner*, 40 Or. 488 (67 Pac. 511).

2. The plaintiff does not question this rule, but he insists that the present suit is not a technical suit to quiet title or determine an adverse claim to real property, but to redeem from a tax sale. There is no such proceeding known to our jurisdiction after issuance of a tax deed. Real property which has been sold for taxes may be redeemed at any time before the execution of a tax deed, by payment to the tax collector, for the benefit of the holder of the tax certificate, the amount paid therefor, with interest, and all taxes, assessments, penalties, interest and costs accruing after the issuance of the certificate, with interest; and such redemption will operate as a cancellation of the sale and a release of all claim on the property by virtue of the tax certificate: B. & C. Comp. §§ 3124, 3125. But if redemption is not made within three years from the date of the sale, the tax collector is required to make out and deliver to the purchaser a deed for the land, which shall vest in him "all the right, title, interest and estate of the former owner": B. & C. Comp. § 3127. The redemption must, therefore, be made, if at all, before the execution of the tax deed. If not so made, the title of the former owner is vested in the purchaser if the tax proceedings are valid.

3. If the proceedings are not valid, the remedy of the owner is at law, unless he is in a situation to bring a suit to quiet title or to determine an adverse claim therein: B. & C. Comp. § 516.

The plaintiff cites *Dolan v. Jones*, 37 Wash. 176 (79 Pac. 640), as an authority to sustain this suit; but the tax laws of Washington are essentially different from ours. In that state property is not sold by the tax collector for delinquent taxes, but a certificate of delinquency is issued by him (Ballinger's Ann. Codes & St. § 1749), which must be foreclosed in a court of competent jurisdiction (Ballinger's Ann. Codes & St. § 1751), before the right of redemption is barred. In *Dolan v. Jones* there was an attempt to foreclose such a certificate, but the proceedings were void for want of jurisdiction. The court held that the right of redemption was not thereby barred, and a suit to redeem from a certificate of delinquency was not technically a suit to determine an adverse claim to real estate, and could be maintained by one not in possession. The case is therefore not an authority, under our method of procedure.

It follows that the decree of the court below must be reversed, and one entered here dismissing the complaint.

REVERSED.

Argued 19 March, decided 23 July, 1907.

STATE ex rel. v. SMALL.

90 Pac. 1110.

APPEAL IN EQUITY—EFFECT OF AS SUPERSEDEAS.

1. The supersedeas effect of a bond for costs in an appeal from a decree is considered but not decided.

WATERS FLOWING IN DITCHES AS REAL PROPERTY.

2. Whether the ownership of ditches and the assertion of the right to convey water through them is real property is referred to but not decided.

SUFFICIENCY OF EVIDENCE.

3. The evidence does not show with sufficient certainty that the defendant committed acts amounting to a breach of the injunction issued against him.

CONTEMPT—DEGREE OF PROOF REQUIRED.

4. In a proceeding for a contempt of court consisting of a violation of an order or process, the proof must be very clear.

Contempt proceeding initiated in the supreme court for an alleged violation of a decree of a circuit court committed after an appeal had been perfected. DISMISSED.

For plaintiff there was a brief over the names of *Andrew Murray Crawford*, Attorney General, *Edward Byers Watson* and *W. J. Moore*, District Attorney, with oral arguments by *Mr. Crawford* and *Mr. Watson*.

For defendant there was a brief and an oral argument by *Mr. Charles Amos Cogswell*.

Opinion by MR. JUSTICE MOORE.

This is a special proceeding instituted in this court by the State of Oregon, upon the relation of *F. M. Chrisman* and *C. D. Porter*, against *George H. Small*, to punish him for an alleged contempt. The facts are that *Annie C. Hough*, having commenced a suit in the circuit court for Lake County against *S. A. D. Porter* to enjoin him from interfering with the flow of water in the channel of Silver Creek to her premises, the relators herein and *Small* were made parties defendant by order of the court, and, issues having been joined, a trial was had, and it was decreed April 7, 1905, that the defendant herein made the prior appropriation of water from that stream and was entitled to use 650 inches thereof for the irrigation of 1,400 acres of land. The injunction prayed for was granted, and the rights of all the parties were determined. An appeal from that decree was perfected October 19, 1905, by the relators and others, who gave an undertaking therefor, in which it was stipulated that they would pay all damages, costs and disbursements that might be awarded against them on the appeal, and the transcript was thereafter filed in this court. It is stated in the initiatory affidavit of the relators that about May 16, 1906, and while there was sufficient water flowing in Silver Creek to furnish the appellants the quantity decreed to each, respectively, *Small*, in violation of a stay of proceedings in the suit mentioned, maliciously turned the water out of the channel of that stream and away from the relators, and his continuous diversion, in July and

August of that year, of the quantity awarded him by the trial court, leaves practically no water in the creek for the relators, whereby they have suffered and will sustain irreparable injury by reason of his conduct. The defendant's affidavit, which is in the nature of an answer to the charge made against him, states the source of his title to the use of the water and the extent thereof as decreed to him.

1. It is contended by the relators' counsel that the statute of this state makes an undertaking on appeal, in suits of the kind specified, a supersedeas, in violation of which Small diverted more water from Silver Creek after the decree was rendered than he had theretofore taken from that stream, and, though the evidence is not direct and positive, it is convincing, and leaves no reasonable doubt of his guilt as charged; and, the appeal having transferred the cause, this court acquired jurisdiction thereof and possesses power to and should punish him for the constructive contempt. The statute permits a final decision of a circuit court to be reviewed by giving a notice of appeal and an undertaking therefor: B. & C. Comp. § 549. It is further enacted that the undertaking of the appellant shall be to the effect that he will pay all damages, costs and disbursements which may be awarded against him on the appeal, but that the proceedings shall not be stayed unless the undertaking also stipulates that the appellant will satisfy the judgment or decree appealed from, so far as it is affirmed in four particular instances (B. & C. Comp. § 550), referring to which, the statute contains the following provision:

"In cases not provided for in such subdivisions, when an appeal is perfected, with an undertaking for the appeal only, proceedings shall be stayed as if the further undertaking thereof had been given": B. & C. Comp. § 551.

Subdivision 2 of Section 550 provides that an appeal from a judgment or a decree given for the recovery of land, or for the partition thereof, does not operate as a supersedeas, unless the undertaking stipulates that during the possession of the real property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if such judgment or de-

cree, or any part thereof, be affirmed, he will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding a sum specified, to be ascertained and fixed by the court or judge thereof.

2. Though the ownership of ditches by the relators, and the legal assertion by them of the right to have the water of Silver Creek flow in such trenches to their lands for the irrigation thereof, may constitute real property (*Fudicker v. East Riverside Irrig. Dist.* 109 Cal. 29: 41 Pac. 1024), we shall assume, without deciding, that the decree rendered in the case of *Hough v. Porter* was not a suit for the recovery of the possession of land or for the partition thereof, so that an undertaking only for appeal stayed the proceedings as if the further undertaking therefor had been given. In *Dulin v. Pacific Wood & Coal Co.* 98 Cal. 304, 306 (33 Pac. 123), Mr. Justice HARRISON, in speaking of a supersedeas, says: "Originally it was a writ directed to an officer commanding him to desist from enforcing the execution of another writ, which he was about to execute, or which might come into his hands. In modern times the term is often used synonymously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment." In this state a writ of supersedeas is unknown, though a certificate of probable cause, issued by the trial judge, or by a justice of this court in a criminal action, is tantamount thereto, the effect of which is to suspend the enforcement of the judgment until it can be reviewed on appeal: B. & C. Comp. § 1475; *State v. Armstrong*, 45 Or. 25 (74 Pac. 1025). We shall consider as true that the giving of the undertaking on appeal in the case of *Hough v. Porter*, which provided only for the payment of damages, costs and disbursements, was equivalent to the granting of a writ of supersedeas by this court, a violation of which subjects the offender to punishment upon proceedings instituted in this tribunal (High, *Injunctions*, 4 ed., § 1431a), on the theory that, though actions at law and suits in equity are tried in this state in the same court, the forums and procedure are essentially

distinct (*Union Power Co. v. Lichty*, 42 Or. 563: 71 Pac. 1044), and that an appeal from a decree brings up for review the entire suit, which is tried anew in the appellate court upon the transcript and the evidence accompanying it: B. & C. Comp. §§ 406, 555; *Day v. Holland*, 15 Or. 464 (15 Pac. 855).

3. Having disposed of those preliminary questions, we will consider the evidence in those proceedings, and in the suit of *Hough v. Porter*, as far as deemed applicable hereto. It appears that Silver Creek flows northeasterly and empties into Pauline Marsh, in Lake County. This stream divides on the defendant's premises, forming a delta. One fork, extending easterly, is known as the "Bunyard Branch," and another, westerly, is called the "Island Branch"; the latter emptying into the parent stream about a mile below the place of its departure. Bunyard Branch flows through the premises of the relator, Chrisman, who uses the water thereof for irrigation. Silver Creek and Bunyard Branch flow through lands of which the relator Porter has possession, and on which the waters of both streams are used for irrigation. The land where these branches head is practically level, and a dam placed in either stream at such place will necessarily divert most of the water at ordinary stages into the other forks.

The supplemental affidavit of the relator Porter is to the effect that, during the irrigating seasons of 1905 and the following year, the channel of Silver Creek, from the head of Bunyard Branch to a line below the premises of which he has charge, was dry, and in consequence thereof he was unable to irrigate such lands, except in the early seasons, when a freshet caused by melting snow filled the banks of the stream; that the supply of water from Bunyard Branch is inadequate properly to irrigate that part of such premises as are moistened by water taken from that fork, the bed of which is at least two and one-half feet higher than the bottom of the channel of Silver Creek; and that in 1906, when the affiant could not secure any water for irrigation, there were at least 200 inches of water flowing off the defendant's land, parallel with Island Branch, to the premises of other parties to the principal suit, who are Small's

friends. E. S. Parks deposed that in 1905 he was employed by the relator Porter, and irrigated a part of his lands, but that in June and July of that year he could not secure any water for that purpose, and was also obliged to remove the stock from such premises to a place where their thirst could be satisfied. P. W. Jones, J. L. Jones and B. L. Taylor severally affirmed that in the latter part of the irrigating season of 1906 no water was flowing in Bunyard Branch through the premises of which the relator Porter had possession. James Reeder deposed that in the irrigating season of 1905 he went to the head of Bunyard Branch to secure water for irrigation, and found in the channel of that stream cans and chips, and also a dam, in which an opening had been made, so that some water passed the obstruction, and that, as he was enlarging the aperture, the defendant arrived and ordered him to desist, and not to shovel out the head of that fork, saying that, if he did so, the augmented flow of water would abrade the bottom of the fork below the bed of the main creek; but that by putting some boards or sacks in the latter stream the water could be turned down Bunyard Branch. The statements contained in Reeder's affidavit are corroborated by the deposition of Floyd Lane, who was with him at the time mentioned, and deposed that they put a dam in Silver Creek and caused the water to flow into Bunyard Branch.

T. J. La Brie's affidavit is to the effect that about August 1, 1904, he placed a dam at the head of Bunyard Branch to free his meadow from moisture, so as to cut the hay thereon, and that about 20 days thereafter he told William Kittredge he might remove the obstruction, and the next morning after granting the permission the water flowed in the channel of that branch through his premises. Kittredge's affidavit states that he took out the dam at the time mentioned. It is quite probable that the entire obstruction was not removed, and that there was left in the channel of the branch part of the dam which Reeder and Lane saw about two years after it was built. It will be remembered that Porter's affidavit states that the bed of Bunyard Branch is at least two and one-half feet higher than the bottom of Silver Creek. P. W. Jones deposes that such difference is

two feet. E. K. Henderson affirms that the variation in the beds of the creek and branch is two and one-half feet, but, as he had theretofore stated, upon oath, that the difference was only five and one-half inches, his subsequent opinion on this subject was probably based on a measurement similar to that made by one C. E. Moore, a civil engineer, who, as a witness at the trial of the principal suit, testified that he considered the bottom of the main channel to be the base of the mud therein, saying: "I took a stick and run it down until it appeared to come to solid bottom, through the mud." S. A. Lester, J. H. Gowdy, James Sullivan, E. J. Egli, W. D. Robinett, J. L. Howard and James Newman severally deposed that on November 1, 1906, they found no obstruction to the flow of water at the head of Bunyard Branch, the channel of which was only five and one-half inches higher than the head of Silver Creek.

We think the preponderance of the evidence conclusively shows that the estimate given by the persons last named is correct, and that the channel of the main creek has not been lowered in any manner by the defendant; nor did he place any obstruction in the head of Bunyard Branch after the decree was rendered. The testimony taken at the trial of the principal suit shows that in 1885 a trench was dug from the east side of Silver Creek, commencing at a point on the defendant's land above the head of Bunyard Branch, which conduit is known as the "Old Corum Ditch," and owned by T. J. La Brie and his wife, W. C. Busick and James Small, who, after April 7, 1905, the day when the decree in such suit was given, changed in some particular the course of the old ditch, calling the alteration the "New Corum Ditch," which commences at a point in the old ditch some distance below its head, where the water is diverted into a conduit owned by the defendant and called the "Old Abshire Ditch," in which it flows about 300 yards and is then conducted easterly in the new ditch. The defendant permitted the alteration to be made in the ditch across his premises, and aided in its construction, and also exchanged the Old Abshire Ditch for that part of the Old Corum Ditch which extends

from its head to the point of departure of the new ditch. A dam placed in Silver Creek caused the water of that stream to flow into the head of the old ditch, as it did prior to any change therein. The affidavit of W. C. Busick states that more water was conducted in the old ditch than is carried in the new conduit. The relator Porter contradicts this declaration by deposing that the old ditch would carry only about three-fourths as much water as the new ditch, and that the defendant uses water flowing in the old ditch for irrigation. We have examined with much care the testimony taken in these proceedings, and are convinced from such inspection that the defendant has not used or diverted from Silver Creek any more water since the decree was rendered than he theretofore took from that stream; nor, after April 7, 1905, has he caused or permitted an increase in the flow of water off his premises, parallel with Island Branch.

It is maintained by the relator's counsel that, the undertaking on appeal having performed the office of a supersedeas, the *statu quo* of the flow of water in Silver Creek to the relators' land should have been maintained by the defendant after the decree was rendered as it existed immediately prior to the time the principal suit was instituted; but, as he has diverted a greater quantity of water from that stream since that time than he did prior thereto, he is guilty of constructive contempt of this court, and should be punished for such violation. If, before the decree was rendered, Small had never used any water from Silver Creek for irrigation, but, after he was awarded 650 inches thereof, he began to divert the measure granted him under an assertion of a right thereto, based on the court's decision, it would be possible to determine with certainty that the *statu quo* of the flow of water in the channel of the stream to the relator's lands had been disturbed by him. The testimony shows, however, that for many years prior to 1905 he had been using the water of Silver Creek for irrigation, under a claim of right thereto by an alleged prior appropriation thereof. Whether or not his right to such use is superior to the claim of all other parties to the principal suit, and, if so, what is the measure of the quantity to which he is entitled, are questions the considera-

tion of which must be deferred until the appeal in such suit has been heard and determined in this court; and, until such decision is rendered, it must be presumed that the decree of the lower court is correct in every particular.

4. In contempt proceedings for an alleged violation of an order or of the process of a court, the proof of the guilt of the person charged with the offense should be clear and conclusive before he is punished therefor. In the case at bar, the evidence is not of that character, and hence the proceedings are dismissed.

DISMISSED.

Argued 10 July, decided 23 July, 1907.

MULTNOMAH COUNTY v. FALING.

91 Pac. 21.

PAUPERS—LIABILITY OF RELATIVES FOR SUPPORT.

1. Under Section 2654, B. & C. Comp., relating to the duty of relatives to support paupers, and the right of the county court to enforce such action, it must be alleged, in an action by a county to recover the cost of supporting the pauper, that the defendant relative has been ordered by the county court to provide the required support and has refused.

COMMON LAW LIABILITY TO SUPPORT POOR RELATION.

2. There is no common law liability resting on a citizen to support his poor relations, such obligation is purely statutory.

From Multnomah: **ARTHUR L. FRAZER**, Judge.

Action to recover a sum of money for the benefit of a pauper. A demurrer to the complaint was overruled and judgment entered on refusal to further plead, from which defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thomas Nelson Strong*.

For respondent there was a brief over the name of *Hayes & Brand*, with an oral argument by *Mr. Ernest Brand, Jr.*

Opinion by **MR. CHIEF JUSTICE BEAN**.

This is an action brought by the County Court of Multnomah County against *Xarifa J. Faling* to compel her to pay to the county \$30 per month for the support of her brother, *Cornelius*

W. Barrett, an alleged poor person, and comes here on appeal from a judgment rendered in favor of plaintiff, after overruling a demurrer to the complaint.

1. Section 2654, B. & C. Comp., provides:

"Every poor person, who shall be unable to earn a livelihood in consequence of bodily infirmity, * * shall be supported by the father, mother, children, brothers or sisters of such poor person, if they or either of them be of sufficient ability; and every person who shall fail or refuse to support his or her father, mother, child, sister or brother, when directed by the county court, * * shall forfeit and pay to the county, for the use of the poor of their county, the sum of thirty dollars per month, or such other sums as the court shall find sufficient, to be recovered in the name of the county court for the use of the poor as aforesaid before any justice of the peace or any court having jurisdiction."

There is no averment in the complaint that the defendant has been directed by the county court to support her brother, and that she has failed or refused to comply therewith, and this is an essential prerequisite to the maintenance of the action.

2. At common law there is no legal liability resting on one relative to support another, however strong the moral duty may be. The duty of providing such support is purely statutory, and the procedure provided for its enforcement is exclusive: *Belknap v. Whitmire*, 43 Or. 75 (72 Pac. 589). Under this statute the county court has no cause of action against a delinquent relative except upon his failure to perform the duty imposed upon him by statute "when directed by the county court." The provision is that every person who shall refuse to support his or her parents, children, brother or sister, "when directed by the county court," shall forfeit and pay to the county for the use of the poor the sum of \$30 per month, or such other sum as the court shall find sufficient, "to be recovered in the name of the county court" before a court having jurisdiction. To fix a liability in favor of the county court and against the delinquent relative, it is necessary therefore that an order be made by the court directing him to discharge the duty imposed upon him, and that such direction has been ignored: *Faling v. Mult-*

nomah County, 46 Or. 460 (80 Pac. 1009). This is the plain reading of the statute, and the necessary and orderly procedure to fix liability upon a delinquent relative, and a complaint by a county court which fails to allege a compliance with the statute necessarily does not state a cause of action.

For these reasons the judgment of the court below must be reversed, and the case remanded, with directions to sustain the demurrer to the complaint, and for such further proceedings as may be proper not inconsistent with this opinion.

REVERSED.

Argued 24 July, decided 20 August, 1907.

STATE v. LUPER.

91 Pac. 444.

CONTINUANCE—DISCRETION.

1. The discretion of a trial court in disposing of a motion for a continuance will not usually be reviewed, particularly where the manifest purpose of the motion is to delay the case until the happening of other anticipated events that would disqualify an important witness.

CRIMINAL LAW—HUSBAND AND WIFE—WITNESSES.

2. Section 724, B. & C. Comp., providing that neither husband nor wife shall at any time be examined as to any communication made by one to the other does not apply to criminal proceedings, the criminal code being complete on the subject of the competency of a husband or wife to testify in a criminal prosecution against the other.

PRIVILEGED COMMUNICATIONS AS EVIDENCE—HUSBAND AND WIFE.

3. One of the exceptions to the rule forbidding evidence of communications occurring between husband and wife during their marriage is the protection of the personal rights or liberty of the one to whom they were made, and for that purpose such evidence is competent without the consent of the other spouse.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

T. J. Luper appeals from a conviction of perjury. In July, 1906, the defendant commenced a suit for divorce against his wife, Lizzie R. Luper, in Department No. 2 of the circuit court for Marion County, alleging that she deserted him in 1904 without cause or provocation and against his will and consent, and had continued her desertion ever since. Service of summons was had upon her by publication, and, as she did not appear within the time required, her default was regularly entered, and

after trial a decree of divorce was rendered as prayed for in the complaint. A short time thereafter Mrs. Luper learned of the decree, and immediately came to Oregon and caused the arrest of defendant for perjury in swearing to the complaint, and at the same time she made an application to open the decree, on the ground that she had a meritorious defense to the suit and had never received a copy of the complaint or summons. Pending her application to open the decree, the district attorney filed an information in Department No. 1 of the circuit court for Marion County against defendant, charging him with perjury in verifying the complaint in the divorce suit. When the application to open the decree came on for hearing in Department No. 2, defendant, by his attorneys, appeared and consented to the allowance of such motion; but the district attorney interposed, and on his suggestion the court declined to make the order, but took the matter under advisement. The defendant thereupon moved for a postponement of the criminal case until his wife's application to open the decree in the divorce suit could be disposed of, but this motion was denied, and the defendant tried and convicted. From a judgment sentencing him to the penitentiary, he appeals, assigning, among other errors, the overruling of his motion for a continuance and refusal of the trial court to permit him to testify as to statements made to him by his wife regarding her intention to desert him.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. William Henry Holmes* and *Mr. Carey Fuller Martin*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *John H. McNary*, District Attorney, and *C. L. McNary*, with an oral argument by the District Attorney.

Opinion by MR. CHIEF JUSTICE BEAN.

1. There was no abuse of discretion in denying the motion for a continuance. The application therefor did not set out a single fact to entitle defendant to a postponement. Its manifest purpose was to secure a delay until the decree theretofore

granted in the divorce suit could be set aside, and the relation of husband and wife between defendant and Mrs. Luper restored, thus disqualifying her from testifying against him in the criminal action without his consent. Certainly such a state of facts did not entitle him to a continuance as a matter of right. Whether the ends of justice would have been subserved thereby was a question for the trial court, and with its conclusion we must decline to interfere.

2. While the defendant was on the stand, testifying in his own behalf, his counsel offered to interrogate him concerning statements made to him by his wife during the marriage regarding her intention to desert him; but the court, on the objection of the state, refused to allow him to do so, for the reason that evidence of any communications between defendant and his former wife, during their marriage, was incompetent. Section 724 of the Civil Code (B. & C. Comp.), provides that a husband and wife cannot be examined, during the marriage or afterwards, as to any communications made by the one to the other. Whether this section includes all communications between husband and wife, or only such as are confidential, it is not necessary now to consider, because it does not apply to criminal prosecutions: *State v. McGrath*, 35 Or. 109 (57 Pac. 321). The Criminal Code is complete within itself as to the competency of the husband or wife to testify in criminal prosecution against the other, and contains no provision governing the proof of communications made by the one to the other. It simply provides that when a husband is the party accused the wife shall be a competent witness, and when the wife is the party accused the husband shall be a competent witness; but neither shall be compelled or allowed to testify, unless by the consent of both, except in cases of personal violence (B. & C. Comp. § 1401), leaving the question of the competency of their testimony either during or after the marriage to be determined by the common law.

3. It is a rule of law, founded upon public policy, the object of which is to secure domestic happiness and tranquillity, that .

"all confidential communications between husband and wife, and whatever comes to the knowledge of either by reason of the hallowed confidence which that relation inspires, cannot be afterwards divulged in testimony" (Greenleaf, Evidence, § 337), even after the marriage is dissolved by death or divorce. But the rule which renders incompetent proof of communications between husband and wife, like that which preserves inviolate communications between attorney and client, is subject to some exceptions dictated by natural justice, and among these is that whenever it becomes necessary to disclose such communications, in order to protect the personal rights or liberty of the party to whom they were made, he is relieved from the obligation of secrecy which the law otherwise imposes. Thus, when a disclosure of communications by a client to his attorney is necessary to protect the personal rights of the attorney, as Mr. Justice SELDEN says, "he must of necessity and in reason be exempted from the obligation of secrecy": *Rochester City Bank v. Suydam*, 5 How. Prac. 254; *Mitchell v. Bromberger*, 2 Nev. 345 (90 Am. Dec. 550). Also, in a trial of a husband for homicide, it is competent for defendant to testify that his wife told him, immediately before the shooting, that the deceased had threatened to kill him: *Shepherd v. Commonwealth*, 119 Ky. 931 (85 S. W. 191). And other similar cases will readily suggest themselves upon a moment's thought.

Now in this case defendant was on trial for perjury in swearing that his wife had deserted him. The truth of this oath, or that it was honestly made, may have depended largely, if not entirely, upon the declarations the wife made to him concerning her intention and characterizing her acts. It would be a hard and unjust rule to deny him the right to protect his personal liberty, and we think the law does not require us to so hold, by giving such declarations in evidence.

Judgment reversed, and new trial ordered.

REVERSED.

Decided 30 July, rehearing denied 3 September, 1907.

GARDNER v. WRIGHT.

91 Pac. 286.

ADVERSE POSSESSION—EFFECT OF SUBSEQUENT ACQUISITION OF TITLE TO PROPERTY BY GRANTOR.

1. Subsequent possession by the grantor of land under claim of ownership, etc., for the period prescribed by the statute of limitations, will not necessarily inure to the grantee's benefit, and title by adverse possession may be acquired by the grantor under such circumstances; but, if possession is held in subserviency to the grantee's title, it will inure to his benefit.

ESTOPPEL BY DEED—PERSONS WHO MAY CLAIM BENEFIT—PAROL TRANSFERS—WATERS.

2. E. conveyed to M. and G. possessory title to public land, including the right to the full use of a stream, and G. orally transferred his interest to M. Held, that no diversion of water having been made prior to G.'s parol conveyance, nor until after a diversion by E. on land above, defendant, as E.'s successor in interest, was not estopped to claim subsequent rights acquired by E. as to G.'s interest in the water rights previously conveyed.

ESTOPPEL BY DEED—DENIAL OF TITLE BY GRANTOR.

3. Where one assumes to convey property by deed, he will not be heard, in order to defeat his grantee's title, to say that at the time of the conveyance he had no title, and that none passed by the deed, nor will he be permitted to deny to the deed its full effect.

ADVERSE POSSESSION—EFFECT OF SUBSEQUENT POSSESSION BY GRANTOR.

4. One relying upon adverse possession as against the grantee of his predecessor must show that there was a change in the relation of the parties respecting the rights involved, any unexplained possession being presumed to be subservient to the title conveyed; and, in order to avail himself of the laches of the grantee or his assigns or of the statute of limitations, the grantor must show that actual or constructive knowledge of the change in the relations was brought home to the grantee or his successors in interest.

WATERS—EVIDENCE OF SUBSEQUENT ADVERSE USER BY GRANTOR—DISCLAIMER.

5. A showing that after a land owner had deeded his farm with the full use of a stream flowing through it, he openly used part of the water from that stream on land that he afterward acquired further up, under posted and recorded notices, with the general knowledge of the community, establishes a disclaimer against the deed, and is sufficient to charge the owners of the deeded land with notice that he did not intend to be bound by the covenants therein, though, of itself, such showing does not establish adverse user.

WATERS—ADVERSE USER—WHEN STATUTE OF LIMITATIONS BEGINS.

6. The statute of limitations begins to run in favor of an adverse claim to the waters of a stream when the conduct of the adverse claimant indicates an intention to claim and hold the water against all other persons, and such conduct is supported by an actual diversion for a beneficial purpose of sufficient proportions to show good faith.

WATERS—EFFECT OF RUNNING OF STATUTE ON ADVERSE CLAIMANT.

7. Where one permits ten years to elapse without regaining control over water to which another has exercised an adverse claim subsequent in date, unless such use was permissive or of such a character as not to constitute an invasion of the rights of the first claimant, the adverse claim becomes a complete title, the rule being the same with reference to both land and water.

ADVERSE POSSESSION—MATERIALITY OF CLAIMANT'S GOOD FAITH.

8. Title by adverse possession may be acquired, regardless of the claimant's good faith, if accompanied by a claim of title.

ADVERSE POSSESSION—ORAL EVIDENCE TO EXPLAIN AND LIMIT MEANING OF DEED IN CHAIN OF TITLE.

9. Parol evidence is admissible by a grantor of the right to the full and free use of the waters of a stream appurtenant to certain land to show that such grant meant only the surplus water not used on another tract owned by the grantor further up the stream.

WATERS—INTERRUPTION OF ADVERSE POSSESSION.

10. Adverse use of the waters of a stream, as a defense to a suit to determine rights thereto, may be defeated by showing that the use during the irrigation seasons for the statutory time was not continuous or by proof that such use did not substantially interfere with plaintiff's rights.

WATERS—BURDEN OF PROOF AS TO ADVERSE POSSESSION.

11. Though an adverse right cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by permission or subserviency, or not to have been continuous, is upon him who attempts to defeat the claim.

WATERS—ACTS CONSTITUTING ADVERSE POSSESSION.

12. Where a claimant of water has for the period of limitations required all the water of a certain stream to supply his needs, the use for that period of a considerable portion of such water by an adverse claimant has constituted an invasion of the rights of the original claimant for that period and establishes a *prima facie* case of adverse possession.

NATURE OF TITLE ACQUIRED BY ADVERSE POSSESSION.

13. When title has once been acquired by adverse possession, it remains in the person acquiring it as completely as if acquired by deed, and hence interruptions of such possession are of no avail unless they have been open, exclusive, continuous and adverse under a claim of ownership for the statutory period.

WATERS—USE DURING DIFFERENT PARTS OF THE YEAR.

14. One may establish a right to the use of water from a stream during one part of a year, while another person may at the same time acquire a right to use the water from the same stream for the remainder of the year.

WATERS—INTERRUPTION OF ADVERSE USE BY THIRD PARTIES.

15. Claims of adverse possession or use must be determined by the acts of parties to the litigation and their grantors, and interruptions by others cannot be considered.

NATURE OF POSSESSION TO CONSTITUTE ADVERSE POSSESSION.

16. The possession required by Section 4, B. & C. Comp., providing that no action can be maintained for the recovery of real property or its possession unless the plaintiff or his predecessor was possessed of the

premises in question within ten years before the commencement of the suit or action, means an actual, substantial and practically permanent occupation, and unless such possession is shown a claimant cannot prevail. An irregular, occasional, interrupted possession will not fulfill the requirement of the statute.

BURDEN OF PROOF UNDER CLAIM OF PRIOR APPROPRIATION.

17. Under the general rule that the pleader has the burden of proof as to his affirmative allegations, it is incumbent upon one who asserts the title to certain water by prior appropriation to satisfactorily prove his claim.

ESTOPPEL—EQUITABLE—NATURE.

18. The doctrine of estoppel is intended to preclude fraud, and imposes silence on one, when in conscience and honesty he should not be allowed to speak, to the accomplishment of justice.

WATERS—NEGLECT TO USE IS ABANDONMENT.

19. A delay of several years in using waters under an initiated but inchoate right amounts to an abandonment.

WATERS—ESTOPPEL BY DEED AGAINST AFTER-ACQUIRED TITLE.

20. An after-acquired title to water rights by the grantor will not inure to the benefit of the grantee, where the grantee knew at the time of the transfer that the grantor had no title and did not expect him to procure one, or where the title purported to be conveyed was an inchoate interest, the completion or forfeiture of which depended upon some acts to be performed, or diligence to be exercised by the grantee, and the grantor has forfeited his inchoate right by neglect.

IRRIGATION REQUIREMENT PER ACRE.

21. In testifying as to the amount of water required to properly irrigate a given tract of land it is desirable to have in the record the facts on which witnesses base their estimates; but in this case the court will adopt the opinion that an inch an acre is sufficient for both domestic and irrigation purposes.

MEASUREMENT OF WATER—"SECOND FEET"—"MINER'S INCHES."

22. The term "miner's inch" is so indefinite and inexact that it is not satisfactory as a standard for measuring water, and this court prefers "second feet," or the quantity of water flowing past a given point in a given space of time under a six-inch pressure.

WATERS—RIGHT OF SUBSEQUENT CLAIMANTS TO USE WATER NOT IN ACTUAL USE BY PRIOR CLAIMANTS.

23. In a case where several appropriators have a right to use the waters of a stream, water not in use for actual requirements should not be diverted or detained, but it should be allowed to pass to the use of the others, all being limited to their actual needs to the extent of their respective appropriations. Appropriators cannot either permanently or temporarily divert water without using it as against the needs of subsequent appropriators.

APPEAL—REVIEW—DISCRETION AS TO COSTS.

24. The trial court having discretionary powers in taxing costs, a decree in respect thereto will not be disturbed unless the discretion is abused.

Statement by MR. COMMISSIONER KING.

This is a suit to determine the right to the use of the waters of Washington Creek, in Baker County, Oregon, brought by Mary S. Gardner, Edna V. Stuchell, A. V. Swift, A. B. Swift, and L. L. Swift, against George F. Wright. By stipulation it is agreed that A. V. Swift has succeeded to all the interests of the other Swifts named, and that he, with Mary S. Gardner and Edna V. Stuchell, are the sole plaintiffs in interest.

The complaint, in effect, alleges that plaintiffs, under and by virtue of prior appropriation of the waters of Washington Creek, as well as by reason of a certain deed executed to their predecessors in interest, are the owners jointly of the right to the use of three-fourths of the waters of the creek named, of which it is alleged that Mary S. Gardner and Edna V. Stuchell are the owners of one-fourth, and A. V. Swift one-half. Defendant denies plaintiffs' right to the use of any of the waters of Washington Creek, except the surplus, and alleges that he is the owner of the exclusive right to the entire stream for the irrigation of his lands, all of which it is claimed is necessary for the proper irrigation thereof, and has been used continuously for such purpose during the last 40 years, with the full knowledge and consent of plaintiffs and their grantors. Defendant alleged, in support of his title, prior appropriation, riparian ownership, and adverse possession since 1863; but the averment relative to riparian ownership was stricken out on motion of plaintiffs.

The reply denies the affirmative allegations, and, in response to the defenses relied on, pleads an estoppel against defendant by reason of a certain deed with covenants of warranty therein given by H. W. Estes (defendant's grantor) and Frederick Dill to their predecessors in interest, which, omitting the signatures and acknowledgment, is as follows:

"This Indenture made this 9th day of September, A. D. 1864, between Harding W. Estes and Frederick Dill of the County of Baker and State of Oregon, parties of the first part, and Oscar L. Gordon and George W. Manville of the same place, parties of the second part, Witnesseth:

That the Said Parties of the First Part for and in consideration of the sum of one thousand dollars to the parties of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed and quitclaimed and by these presents do grant, bargain, sell, convey and forever quitclaim unto the said parties of the second part their heirs and assigns forever, all the right, title, interest and claim of the said parties of the first part in and to a certain ranch or possessory claim to agricultural lands and the improvements thereon lying and being in said county and state and described as follows, to-wit: That certain ranch or land claim on Washington Creek in Powder River Valley below and adjoining Gray's ranch which has been improved by the parties of the first part and upon which they have resided from the month of June, A. D. 1863, to the past summer, and bounded as follows, to-wit: Commencing at a stake about three rods south of said creek and about thirty rods in a southwesterly direction from the log house built by said parties of the first part and occupied by them as a residence; thence east along a fence one hundred and sixty rods; thence north along a fence one hundred and sixty rods; thence west along a fence one hundred and sixty rods; thence south along a fence one hundred and sixty rods to the place of beginning; together with the right to the full and free use of the water of said Washington Gulch and all privileges connected with the same, the said water having been taken up and appropriated by the parties of the first part, for the use and benefit of said ranch in the month of June, A. D. 1862, at the time said ranch was located and claimed.

To Have and to Hold the said premises, together with all and singular the rights, privileges, tenements, appurtenances and improvements thereunto belonging or in any manner appertaining.

And the Said Parties of the First Part hereby covenant with and to the parties of the second part, their heirs and assigns, that they are the lawful possessors of said land or ranch and the sole owners of the improvements thereon and of the water right above mentioned, and that they have a full and perfect right to sell and dispose of the same, and that the title to the same they will forever warrant and defend against all persons whomsoever claiming by, through, or under them, or either of them.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals this the day and year first above written."

By stipulation it was admitted that A. V. Swift is the owner in fee of the S. E. $\frac{1}{4}$ of section 2; that Mary S. Gardner and Edna V. Stuchell have succeeded to the interest of J. B. Gardner, deceased, in and to the N. E. $\frac{1}{4}$ of section 11; and that George F. Wright is the owner in fee by purchase from H. W. Estes of the lands described in the answer, viz.: W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ section 11; E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, section 10; N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, section 15—all the lands so described being in township 9 S., range 39 E., W. M.

Washington Creek is a natural stream fed by springs and snow in the mountains west of Baker City, and flows in a northeasterly direction through Washington Gulch across defendant's premises and through Gardner and Stuchell's lands onto the Swift farm, where it spreads out and disappears. It varies in quantity from a flow of 10 miner's inches in the low-water season to 150 inches during the early spring freshets. In 1862 Estes and Dill settled upon what is now defendant's farm, and in the following spring took possession of some lands lower down the stream, now constituting the farm of A. V. Swift; the latter farm being the premises referred to in the deed to Gordon and Manville. The first place named is known as the "Estes Farm," and the second as the "Swift Ranch." In the spring of 1863 a ditch was constructed by Estes and Dill tapping Washington Creek, through which water was conveyed onto the Estes place for the purpose of irrigation, and on April 25th of the following spring they located a water right for the lower Swift farm by posting a notice thereof on the channels of the stream, which was on that date recorded with the county clerk of that county, as follows:

"WASHINGTON GULCH.

Know All Men that the undersigned hereby claims all the water of Washington Gulch for the purpose of using the same on his land claim in Powder River Valley. Said ranch joins Gray's ranch on the east. And the water hereby claimed is the natural water of said gulch that flows in its natural channel through said land claim, which is thus claimed for the purpose of preventing the same from being abstracted in its flow at any point above said claim.

Frederick Dill."

In February, 1864, the Estes Farm was sold to Abner Smith, who resided there until his death, which occurred in the fall of 1865. His family continued to live there, and in 1867 his widow married Estes, one of the former owners of the farm. At that time all the land on Washington Creek was unsurveyed public land of the United States. In 1869 Estes filed a homestead on the land, to which the right of possession had been sold to Smith, as stated, and about two years later made final proof thereon, receiving his patent in 1878. After his marriage, Estes continued the cultivation of the crops, which he irrigated with water diverted from Washington Creek through the ditches previously constructed for that purpose; and, in order to publicly announce and record his claim thereto posted a notice at the head of the ditch constructed in 1863, which he caused to be recorded in the county clerk's office, as follows:

"WASHINGTON CREEK.

Notice is Hereby Given that I, Hardin W. Estes, hereby claim 75 inches of the waters of Washington Creek for mining, mechanical and irrigating purposes, the same having been heretofore taken, appropriated and diverted from said stream by a certain ditch constructed by the undersigned in 1863, tapping said creek at a point about a quarter of a mile above what is known as the 'Washington Ranch' in Baker County, Oregon, and claimed and used by the undersigned since said date.

Dated and signed at Washington Ranch, Baker County, Oregon, March 19, 1872. Hardin W. Estes."

On the same date, and recorded at the same time, another notice of like import was posted farther down the creek by him on his land, claiming an additional 75 inches of water through a ditch tapping the creek on his premises "at a point opposite what is known as Washington Ranch house," alleging diversion from that point through a ditch constructed in June, 1866.

In support of their claims, plaintiffs, at the trial, introduced deeds showing the record evidence of title to their respective interests from the date of the first written instrument executed by Estes and Dill to plaintiffs' predecessors in interest. Witnesses were then called, who testified to the use of the water of

the stream for irrigation of plaintiffs' lands in the production of hay, grain, vegetables and some orchard at various times since the year 1884, but not prior to that time, except that M. J. Hindman referred to some irrigation on the Swift place in 1867, but did not state to what extent and for what purpose used, but that hay and grain were raised on the premises during that year. With this exception, no evidence was offered tending to show an appropriation prior to 1884, except in so far as an appropriation might be inferred from wild hay raised on the land, the moisture for which was produced by the waters of Washington Creek spreading over and sinking into the ground, and from springs rising below defendant's farm.

W. C. Hindman testified that he has resided in the vicinity of the property and been familiar with it since 1863; that in the fall of 1863 he bought hay on the Swift farm from Estes and Dill; that hay and grain lands in that vicinity are usually irrigated until some time in July of each year, and lands along Washington Creek require about one inch per acre for their proper irrigation; that on the place now owned by Swift the land is naturally damp. When asked whether three-fourths of the water from Washington Creek would properly irrigate plaintiffs' lands, he answered:

"There might be enough in a season where there was a flow of water, but in a dry season there would be a scarcity. * * I don't think that it would be (sufficient) at present. It might at one time. There was several years there that the miners threw down sometimes 1,000 inches, from 500 to 1,000 inches, and it has carried an immense deposit of debris onto his ranches, and since that it has taken more water than it formerly did."

Mary S. Gardner testified that she was the wife of J. B. Gardner, deceased, and the mother of Mrs. Stuchell, one of the plaintiffs; that in 1897 she had a conversation with H. W. Estes, in which he admitted both had rights in the waters of Washington Creek; that Estes said his right was given him by the court in his suit with Sparks, the amount of which was 75 inches. J. P. Kennison testified that he has lived in Baker County since 1862, and has been familiar with the Washington

Gulch at all times since; that he cut wild hay on the Swift place in August, 1863, but there were no ditches there at that time; that the water spread out over the ground when it reached the place, covering about 80 acres, which condition does not exist on the Estes place and could not without dams to divert the flow from the channel. C. M. Foster deposed that he has known the farms on Washington Creek since 1862, seeing them at various times every year since; that on request of Estes he surveyed the ditch on the south side of the creek on the Estes place many years ago; that the ditch would probably carry 75 inches of water; that he also saw a ditch on that farm in 1863 or 1864, which would carry from 30 to 50 inches of water, then used there for irrigation purposes; that the altitude of the Estes ranch is about 100 feet higher than that of the Swift farm, and was one of the first settled in Baker County, and since in the early sixties has been irrigated and used for raising hay and all kinds of fruits and vegetables; that the orchard covers from 15 to 20 acres, and has been there so long he cannot tell when it was first set out; that he bought hay on the Swift ranch in 1865; that the creek flows down onto the Swift place and spreads out over 50 to 70 acres, where the creek and channel disappears. H. Kennison testified to having known the premises since 1863, and substantially corroborates the statements of the two witnesses last quoted.

David Littlefield testified to having mined and known the farms in that locality since 1862; that he noticed the Estes farm being cultivated during each season at all times since 1863, during which year the road passed in front of the house and crossed the ditch going west, which ditch has been used ever since for irrigating the garden, orchard and ranch generally; that the orchard was small at first and increased in size from year to year, and has been there over 30 years; that he first saw the ditch on the J. B. Gardner ranch in 1875, which place was then occupied and owned by Mrs. Irland, who, at that time, wanted to sell the farm to him, stating she owned one-fourth of the water coming down the gulch, but that the neighbors were taking it away, and said:

"We have no claim on Mr. Estes' water, but we have all the water below that Mr. Estes don't use."

Witness also stated that he never saw any ditches of any kind on the Swift place prior to 1875 or 1876.

H. W. Estes testified to having been in partnership with Dill in the lands owned by the parties to the suit, to having located the water rights and selling the lands, etc., as hereinbefore given, and substantially corroborated the statements of Kennison Foster and Littlefield; that at all times since 1863, vegetables, fruit, hay and grain have been raised on the Estes place, and all the waters of Washington Gulch were used in the irrigation thereof, whenever needed, and without interruption; that sometimes he turned the water down to those below when he could spare it for their accommodation; that the water right considered sold and intended to be conveyed by the deed to Gordon and Manville was for water which flowed down to the Swift place after being used on the Estes place, and he never recognized any other right; that after the first few years he took all the water of the gulch to irrigate the lands in cultivation; that he lived on the place until about 1894, when he rented it and moved to Baker City; that all the water ever used at any time on the farms below him was the surplus passing his farm; that the creek furnishes from 100 to 130 inches in the early spring, and falls as low as 15 inches in the fall; that the irrigation season on defendant's place has been from May to November of each year; that the orchard was set out in 1868, and increased from year to year, having been of its present size for about 12 years, and must be irrigated through August, September and October of each year, but hay and grain in that vicinity do not need irrigation after July; that the lands cultivated on the defendant's farm are from 60 to 70 acres; that he filed on the Estes place as a homestead in 1869, and made his final proof in 1871; that, after his marriage to Mrs. Smith in 1867, he always claimed the waters of Washington gulch; that he was never interrupted in the use of the water but once, and that was by Mrs. Swift about the year 1893; that he never had any trouble with any one below, and no one ever tore out any of his dams at

any time. The statements of this witness as to the date of commencement, time, manner, and purpose of use is corroborated by Mrs. Estes. She also adds that her first husband, Abner Smith, purchased the water right to the Estes place from Estes and Dill; that she married Estes in 1867; that a large crop has always been raised on the farm, and, so far as she knew, the use of the water by Estes had not been interrupted at any time prior to the date of his conveyance to defendant.

W. H. Kennedy testified to having resided on the J. B. Gardner ranch 13 years. That during that time he has irrigated all the land on the place for which he could get water, being about 90 acres, consisting of pasture, 10 acres; hay, 30 acres; grain, 50 acres. That with water the farm is worth about \$4,000, but of little value without it; that he farmed the Swift place from 1886 to 1888; that with water it is worth about \$5,000, but without water, about half that value; that while there he occasionally tore out both Estes' dams; that during most of the time he has been on the Gardner place he has done without water on account of persons using it on the Estes place, and "once in a great while" he would go up and tear the dams out, sometimes once, and sometimes twice a week, but never said anything to either Estes or Wright about it, and when the water was obtained as indicated it would "probably come down one day, and may be not two hours;" that the effect was it came near drying them out altogether; that Washington Creek flows through the Swift place about a quarter of a mile, and then spreads out over the meadow; that the irrigation season begins "as soon as the frost goes out," but for grain they irrigate during June and July; that they quit irrigating about August 1st of each year; that when on the Swift place ('86-'88) there were 66 acres of grain and 70 acres of hay land; that on the Gardner place there were at that time 60 acres of grain land and 25 acres of hay land, and about the same amount now; that the dams were torn out during the months of May and June; that the creek furnishes insufficient water to properly irrigate the Gardner and Swift places; that in April the water is very high, but in May the supply dwindles down to about 25

inches, and in June will average about 20 inches, but in July not more than 12 inches, which continues about the same during the rest of the season; that there are some small springs on both the Gardner and Swift places.

Frank Kennedy testified that in 1904 they had no water for irrigation of the Gardner place, but cut about 15 tons of grain and 80 tons of hay; the hay being raised on land which was usually moist; that the usual hay crop is from 70 to 90 tons; that the water is usually turned on the grain land the last of April, from which the hay land situated below is subirrigated. A. V. Swift testified that he has 120 acres in cultivation; that he irrigates 40 acres of hay land with Washington Creek, and there are 80 acres of hay land on the Swift place, which has been there as long as he can remember, and 100 acres on the J. B. Gardner ranch, requiring irrigation. George F. Wright (defendant) testified that Washington Creek flows in well-defined channels northerly through his land; that immediately below his place the combined springs furnish a supply of about 10 inches of water, which is caught by a ditch running onto what is known as the "Rea Place" (not here involved), and is used to irrigate an orchard on the Gardner place, but at times flows down the creek, and, if unobstructed, would continuously flow to plaintiffs' farms; that the amount of water in the creek at his place in April is sometimes 200 inches, in May will average 75 inches, June 50 inches, July 30 inches, and the rest of the season about 10 inches; that it is absolutely necessary to irrigate his orchard through July, August, September and October, of each year, without which the land is worth not more than \$6 per acre, but with the water during those months is worth about \$22,000; that the orchard covers about 20 acres and requires all the water in the stream during those months for its irrigation. Fred Intermill testified that while farming the Swift place in 1900 he asked Estes for some water, which was turned down for the irrigation of his garden.

Otto Lambert testified that he lived on the J. B. Gardner ranch from 1884 to 1888, when Mrs. Irland had it, living there one year with his father, and during that time irrigating the

farm with water taken from Washington gulch; that, when there was not sufficient water, witness' father was ordered by the person in charge to go and turn it down, and he would sometimes tear the dam out; that Mr. Estes was around the road near there, and would sometimes ask what they were doing, etc.; that this occurred nearly every season, and on such occasions they would get most of the water; that when they would cut the Estes dams the water would sometimes run a day, and again it would not run that long; that this occurred each year he was there; and that, when they would tear out the dams, they would not speak to Estes about it, but he would go and turn the water back and use it for irrigation. Henry Lambert and a number of other witnesses on behalf of plaintiff testified to like interruptions having occurred at various times from 1884 to the date of the commencement of this suit.

The testimony was taken before the court, resulting in a decree in favor of plaintiffs, by which Mary S. Gardner and Edna Stuchell, jointly, were decreed an eighth interest, and A. V. Swift, one-fourth of the entire stream, and enjoining defendant from interfering with plaintiffs' use to the extent of three-eighths' interest, jointly, in Washington Creek during all seasons of the year. From the decree so entered plaintiffs appealed, and defendant filed a cross-appeal. **MODIFIED.**

For appellant and cross-respondent (plaintiff) there was a brief over the name of *Hart & Smith*, with an oral argument by *Mr. Julius Newton Hart*.

For respondent and cross-appellant (defendant) there was a brief and an oral argument by *Mr. Charles Augustus Johns*.

Opinion by MR. COMMISSIONER KING.

It is unnecessary to determine whether the court erred in sustaining plaintiffs' motion to strike out defendant's averment concerning riparian ownership, since the evidence as taken does not indicate an intention to rely upon this defense. Plaintiffs, through their predecessors in interest, claim the entire flow of Washington Creek by prior appropriation, which is asserted through the Estes and Dill deed given to Gordon and Manville

in 1864, wherein the appropriation is expressed as having been first made by these grantors in June, 1862. The defendant, as indicated by the evidence adduced in his behalf, relies on adverse possession through his grantor, Estes, for more than the statutory period, having its inception in an appropriation made in the spring of 1863, which is alleged to be prior in time and superior in right to any valid claim of plaintiffs.

It is urged by defendant, and testified to by Estes, that there was no intention of conveying any water rights by the deed referred to, except a right to the surplus water flowing below defendant's lands; but the covenants in the deed, when construed in connection with the water notice of Dill, then on record, convey and warrant the title to the entire stream, to the extent that it may be applied to a beneficial use on the land to which right of possession was therein conveyed, whether such use should be for irrigation or for other purposes. The showing made to that effect in support of the allegations of the complaint, in the absence of other evidence, establishes, as against defendant, a *prima facie* right to the use of the water in plaintiffs to the extent that they may have succeeded to the interests named in the Estes and Dill deed. To overcome this proof defendant insists that he has established his right to the use of the stream (except as to the surplus water) by adverse possession for more than 40 years.

1. Plaintiffs maintain that defendant, through his grantor, is estopped by the covenants in the deed from asserting this defense. It appears well settled that a subsequent possession by a grantor of premises conveyed, under claim of ownership, etc., for the period prescribed by the statute of limitations, will not necessarily inure to the benefit of his grantee, and title by adverse possession for such period may be acquired by such grantor: 16 Cyc. 697; *Jones v. Miller* (C. C.) 3 Fed. 384; *Stearns v. Hendersass*, 9 Cush. 497 (57 Am. Dec. 65); *Hines v. Robinson*, 57 Me. 324 (99 Am. Dec. 772); *Sherman v. Kane*, 86 N. Y. 57; *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644). In the case last cited, the Supreme Court of Nebraska on this point say: "It must be evident that, if the grantor subsequently

makes an entry upon the possession of the grantee, there is no presumption that the new possession so acquired is permissive or subordinate to the grantee. This would be more obvious where several years intervene between the grant and the entry. Whatever the rule may be where the possession of the grantor continues after the conveyance, in such a case the new title may be established by proof of open and notorious adverse possession, as in other cases." It must be conceded, however, that, notwithstanding the rule stated, if such possession is held in subserviency to the title of the grantee, the possession thereof would inure to the grantee's benefit.

2. The circuit court held, in effect, that, when Estes reacquired the water rights above the Swift farm, any interest so obtained inured to the successors in interest of Manville by reason of the covenants in the deed given to Manville and Gordon in 1864, and that defendant, through Estes, his grantor, is estopped from asserting his claim to the subsequently acquired water rights to the extent that plaintiffs have succeeded to the interest of Gordon and Manville; but held that, since Gordon made only an oral transfer to Manville of his interest in the possessory title to the property acquired under the Estes deed, upon which water had not been diverted at the time of the conveyance, nor prior to the diversion by Estes, the estoppel could not be invoked as to Gordon's half interest in the property described in the deed. The court accordingly held that defendant, as successor in interest to Estes, was estopped to the extent of only one-half of the water right previously conveyed, and found in favor of plaintiffs for one-half of the rights claimed and demanded by each of them. Since no diversion was made prior to the time of the parol conveyances by Gordon, nor until after the diversion and use subsequently made by Estes, it is clear that the court did not err in this holding in respect to Gordon's interest, although a different rule applies where actual appropriation has been made: *Nevada Ditch Co. v. Bennett*, 30 Or. 59 (45 Pac. 472; 60 Am. St. Rep. 777).

3. We are then confronted with the question: Was Estes estopped to assert title adversely as to the remaining interest

claimed by the successors in interest of Manville? The general rule is recognized to be that, when a person assumes to convey property by deed, he will not be heard, for the purpose of defeating the title of the grantee, to say that, at the time of the conveyance, he had no title, and that none passed by the deed. Nor can he deny to the deed its full operation and effect as a conveyance, and such deed conveys all after-acquired titles: 16 Cyc. 686, 689, 701; *Taggart v. Risley*, 4 Or. 235; *Wilson v. McEwan*, 7 Or. 87; *Raymond v. Flavel*, 27 Or. 219 (40 Pac. 158). From the foregoing authorities it is clear, under the *prima facie* showing made by plaintiffs by the deed and Dill notice of location of water right, that defendant, by reason of receiving his title through Estes, would be estopped from asserting that, at the time of the execution of the deed from Gordon and Manville, the grantors had no authority to convey more than the surplus waters of the stream; that, notwithstanding they had previously sold an interest therein to Abner Smith, they were estopped in equity from setting up such sale as against any claims of the grantees, or their assigns. This would preclude defendant, as grantee of Estes, in the absence of other testimony, from asserting any title to the water through any rights that may have been received, if any, through the marriage of Estes to Mrs. Smith.

4. As to whether Estes or his grantee are estopped by the covenants in the deed from claiming title by adverse possession against Manville's grantees, however, another and different question arises. There can be no doubt, under the law, that it is incumbent upon a person relying upon a claim of adverse possession, as against a grantee in a warranty deed, to clearly show that there was a change in the relation of the parties with reference to the rights involved before such right can be maintained. Any unexplained possession, therefore, is presumed to be in subserviency to the title placed on record by the deed, from which it follows that the grantor, in order to avail himself of the laches of the grantee or assigns, or of the limitations prescribed by law, must show that he brought home to the grantee and his assigns knowledge, either actual or constructive, of such change in the

relations of the parties: *Jones v. Miller* (C. C.) 3 Fed. 384; *Sellers v. Crossan*, 52 Kan. 570 (35 Pac. 205); *Schwallback v. Chicago, M. & St. P. Ry. Co.* 69 Wis. 292 (34 N. W. 128: 2 Am. St. Rep. 740).

5. It is incumbent, therefore, upon defendant to show to the satisfaction of the court that his possession was not in subserviency to the grantee. The authorities are practically unanimous in support of this view, which appears to be the strong contention of plaintiffs' counsel. We will then examine into the status of the case before us on this point. An examination of the testimony discloses no question as to the character of the holding, not only as to the possession of the defendant, but of his predecessor in interest, Estes. We find that Estes and Dill conveyed all the water, so far as the language of the deed is concerned, to plaintiffs' predecessors in interest, and that possession was surrendered to them under the deed, although, prior to such conveyance, they had sold the land above with a water right in the stream to Smith. Three years after the execution of the deed to Gordon and Manville, at a point on the same stream above their lands and for the irrigation of the farm previously sold to Smith, upon which Estes afterwards filed as a homestead. Estes began to assert a separate and distinct right and to use the water for the irrigation of his homestead. Five years later, presumably for the purpose of further protecting and maintaining his claim to the water, he, at the diversion points, posted and recorded the notices mentioned. When considered under the issues, as pleaded, together with the fact that the Estes farm was being irrigated by the use of the ditches mentioned, that a large orchard had been planted, which, with crops of hay and grain, were necessarily being sustained by the use of the water of this stream, all which notices, with the other facts and circumstances stated, were sufficient to establish a disclaimer, under the covenants given, and bring home to the knowledge of the grantee full notice of the change in their relations: *Petrain v. Kiernan*, 23 Or. 455 (32 Pac. 158); *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644). The testimony showing the open use of

the water under the notices posted, growing crops, and general knowledge thereof in the vicinity, while not sufficient to establish ownership, was clearly competent as evidence for the purpose of establishing claim of ownership as well as to indicate open and adverse possession under this defense: *Petrain v. Kiernan*, 23 Or. 455 (32 Pac. 158); *Rowland v. Williams*, 23 Or. 515 (32 Pac. 402); *Boyce v. Cupper*, 37 Or. 256 (61 Pac. 642); *Eastern Oregon Land Co. v. Cole* (Or.) 92 Fed. 949 (35 C. C. A. 100); *Land Grant Co. v. Dawson*, 151 U. S. 586 (14 Sup. Ct. 458: 38 *Fitzgerald v. Brewster*, 31 Neb. 51 (47 N. W. 475); *Maxwell* L. Ed. 279).

6. When it appears that there was an intention on the part of Estes to claim and hold possession of the use of the stream for a beneficial purpose, in defiance of any rights claimed by his grantees and their assigns, the statute commenced to run, if such intention was accompanied by acts of diversion sufficient to indicate a purpose to carry such determination into effect. We have evidence of such motive and purpose in the notices posted and recorded, together with the use of the water both prior and subsequently made. From that time (April 15, 1872) the character of his possession cannot be doubted, and from which date, if not before, the statute of limitations began to take effect.

7. If it appears that plaintiffs and their predecessors in interest permitted 10 years to elapse without regaining control, during which Estes was using the water, when needed, for irrigation and domestic use, then such delay vested a complete title thereto in Estes, and constituted an absolute bar to the maintenance of this suit, unless it is shown that such use was permissive, or that it was of such character as not to constitute an invasion of the rights of the lower proprietors, against whom he was claiming and asserting such right. From the time, therefore, that Estes openly manifested his intention by the notices and use of the water, as stated, whatever may have been the character of his possession before, his possession became adverse, and in no way could it then be found that he was holding in subserviency to the deed previously given. Being in actual possession and making constant use, when needed, of the necessary

amount, it required only an adverse claim, however wrongful it may have been, and however well he may have known that his rights were unfounded, to render the possession adverse, and as to whether such possession and use were either knowingly wrongful or without right is unnecessary to determine.

8. It is the office of the statute of limitations, as enacted by our legislatures, as well as recognized by the courts from earliest history on the subject, to prevent and avoid the uncertainty in titles and property rights which would necessarily exist if persons were permitted to wait until after a generation had passed away, taking with it the most capable witnesses, before questioning another's rights. It is therefore settled that title by adverse possession may be acquired regardless of the good faith of the claimant, if accompanied by even a pretense, commonly known as a claim of title. The principles here invoked on these points have long been recognized in this state: *Parker v. Metzger*, 12 Or. 407 (7 Pac. 518); *Joy v. Stump*, 14 Or. 361 (12 Pac. 929); *Coventon v. Seufert*, 23 Or. 548 (32 Pac. 508); *Oregon Const. Co. v. Allen Ditch Co.* 41 Or. 209 (69 Pac. 455; 93 Am. St. Rep. 701).

9. On this point, however, it will be observed that, while prior to the posting of the notices, Estes may not have had what is termed a color of title, yet he claimed under what was, to say the least, its equivalent, and held under circumstances furnishing strong evidence of good faith. He had married the occupant of the unsurveyed farm, and to preserve their holdings, when the public lands occupied by himself and family were surveyed, filed on the land as a homestead, receiving the government's receipt therefor. He testifies that it was not his intention, by the deed given plaintiffs' predecessors, to convey more than the surplus water, which testimony is admissible for the purpose of showing his intention when he made the diversion under his notices; and, evidently believing it was only the surplus to which his grantees were entitled, and becoming a riparian proprietor on the stream by virtue of it being his homestead, he presumably considered his claim to be under a valid and existing right. While such claim was not conclusive against his grantees, these circum-

stances are entitled to great weight in determining the status of his claim at its inception, as to whether his possession was in subserviency of or adverse to others on the stream.

10. The adverse possession urged and established as a defense may be defeated by showing that such use was interrupted within the statutory period, or, in other words, that the use during the irrigation seasons for the statutory time, under the conditions named, was not continuous, or by proof that such use did not substantially interfere with plaintiffs' rights: *Britt v. Reed*, 42 Or. 76 (70 Pac. 1029).

11. While an adverse right cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by such permission or subserviency is cast upon the party attempting to defeat such claim: *Coventon v. Seufert*, 23 Or. 548 (32 Pac. 508); *Rowland v. Williams*, 23 Or. 515 (32 Pac. 402); *Bauers v. Bull*, 46 Or. 60 (78 Pac. 757); *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. 644). The same rule would necessarily apply to any other assertion made for the purpose of defeating the running of the statute, and it accordingly follows, after the showing made by defendant, that, in order to defeat his claim of adverse possession, the onus was upon plaintiffs to establish that the use by Estes was not continuous for the statutory period, as well as to establish, if reliance is had thereon, that the use by defendant and his grantor was not such as to constitute a substantial interference with their rights.

12. So far as appears in the record, the plaintiffs and their predecessors in interest at all times, since the open manifestation by Estes of his claim in 1872 to the waters of Washington Creek, actually needed all the water of this stream for domestic and irrigation purposes. Its use, therefore, by defendant and his grantor under such conditions constituted an invasion of the rights claimed by plaintiffs and their predecessors. It being incumbent upon the plaintiffs to show that the use of the water on the Estes farm did not substantially interfere with their wants, nor constitute an invasion of their rights, and there being no evidence in the record to that effect, but, on the contrary, it appearing that the use of the water was necessary, and that they

were deprived of its benefit by the Estes place for more than the 10-year period, the claim of adverse possession is clearly established, unless shown that the interruptions by plaintiffs' predecessors were sufficient to prevent the running of the statute in defendant's favor.

13. On this point it will be observed that no claim of interruption is asserted, nor attempted to be established, prior to the year 1884. No principle of law is better established than that, when title is once acquired by adverse possession for the statutory period, such title remains in the person so acquiring it as completely as if conveyed to him by deed from the owner: *Joy v. Stump*, 14 Or. 361 (12 Pac. 929). Therefore, after the title by such possession became complete, no interruptions were of any avail to plaintiffs, unless actual, open, exclusive, continuous and adverse, under claim of ownership for the statutory period: B. & C. Comp. § 4; *Pearson v. Dryden*, 28 Or. 350 (43 Pac. 166); *Oregon Const. Co. v. Allen Ditch Co.* 41 Or. 209 (69 Pac. 455; 93 Am. St. Rep. 701); *Sherman v. Kane*, 86 N. Y. 57. In this case, then, it is conclusively shown that Estes, under his adverse claim, had the continuous and uninterrupted use of the waters from 1872 to 1884, without interference by any one, and his claim and open assertion of right being established as commencing not later than 1872, it ripened into a complete title prior to 1884, of which he has not been divested.

14. It is urged, however, that his title had not then become fully vested, and that the temporary interruptions of his use of the water, after 1884, were sufficient to stop the running of the statute, that is, that the use did not continue, without interruptions, for any 10-year period. On that point it will be observed that none of the uses testified to by plaintiffs are shown to have been permanent, and none are claimed to have taken place at any time, except during June and July. It is the law that one person may establish a right to the use of water during one part of a year, while another may, at the same time, secure a perfect right to the use of the waters of the same stream for the remainder of the season: *Long, Irrigation*, § 61; *McCall v. Porter*, 42 Or. 49 (70 Pac. 820, 71 Pac. 976). It follows, then,

that, under the most favorable application of the testimony possible for plaintiffs, they have lost the rights which they or their predecessors may have had to the waters of Washington Creek by adverse possession of defendant and his grantor, unless it be during June and July of each year.

15. The question then arises: Were the interruptions of Estes' use of the waters, in the manner testified to by some of plaintiffs' witnesses, sufficient to prevent the running of the statute in his favor during those months? From the record it appears that much of the testimony relative to interference with his use was by parties farming the Rea place adjoining plaintiffs' lands, and whatever water may have been procured by them was used on that place. But since the right to the use of the water by the owners of the Rea farm is not involved in this suit, plaintiffs cannot avail themselves of any interference on the part of persons occupying those premises. The result of this proceeding must be determined with reference only to the parties involved here: *McCall v. Porter*, 42 Or. 49 (70 Pac. 820, 71 Pac. 976). As to the parties herein, the testimony of nearly all the witnesses indicates the water to have been taken by them from the Estes place without his knowledge, and that, when he discovered any interference, its use would be immediately reclaimed. A fair example of these interruptions, if they can be termed such, finds expression in the statement of some of plaintiffs' witnesses, to the effect that they would sometimes go up and cut the Estes dams, after which water would occasionally run a day, and again not that long; that when they went up and turned the water down or cut the dams they would not speak to Estes about it; or, as stated by Kennedy, that during the 13 years he was on the Gardner place he did without water most of the time on account of persons using it on the Estes farm, and "once in a great while" he would go up and tear dams out, and that when the water was thus obtained it would "probably come down one day and maybe not two hours," the effect of which was that it came near drying them out altogether.

16. Under Section 4, B. & C. Comp., plaintiffs cannot maintain the suit unless it appears that they or their predecessors

were seised or possessed of the property in question within 10 years immediately prior to the commencement of this proceeding: *Fellows v. Evans*, 33 Or. 30 (53 Pac. 491); *Maas v. Burdette*, 93 Minn. 295 (106 Am. St. Rep. 436: 101 N. W. 182).^{*} To gain possession it must be such a re-entry or recapture of the use of the water as can be turned complete. Possession by permission of Estes was insufficient for this purpose, and a mere temporary cutting of his dams without his knowledge, whether to his injury or not, would be insufficient. It would not be seriously contended if A. takes possession of land, fences it, constructs and occupies a residence thereon under a claim of ownership, etc., for 10 years, and B. at different short intervals forced himself onto the land, placing his tent there and remaining until discovered, or until dispossessed as soon as discovered, that such interference and possession would be sufficient to stop the running of the statute. In discussing the question as to whether an unsuccessful action in ejectment would toll the statute, it is given as the rule that "prosecutions, to stop the running of the statute, must be successful, and lead to a change of possession": *Moore v. Greene*, 60 U. S. (19 How.) 69 (15 L. Ed. 533). So it might also be said that an attempt to regain possession of a water right, the use of which had been under the actual control and in the possession of another, must be successful and lead to a change in its control before it can defeat such claim under the statute. In order to have affected the legal status of Estes as an adverse claimant, so as to prevent the statute from running, he must not only have had knowledge, actual or implied, that the interference was taking place, but there must also have been at least an implied yielding thereto; or, if not, then there should have been such an entry as would have challenged this right to such extent as would ordinarily have been termed successful, and not possession for merely such time as to enable Estes to learn of the removal of the dams and replace them: Angell, Water-

^{*}NOTE.—As this case appears in 91 Pac. 286, 295, other authorities are cited on this point, but are omitted here by direction of the court.

courses (6 ed.), § 211; *Workman v. Guthrie*, 29 Pa. 495 (72 Am. Dec. 654). The reason and spirit of our statute on the subject does not contemplate that slight interruptions will stop its running in favor of one, who, for all practical purposes, maintains possession of the property, for, if such rule should prevail, so far as applicable to the determination of water rights, it would, in effect, be a mere nullity.

17. Thus far we have examined only the question of estoppel urged by plaintiffs relative to the defense of adverse possession, relied upon by the defendant, thereby first considering the main points to which our attention has been directed by counsel for the contending parties. But, whether intended as a foundation upon which to base the defense of adverse possession, by way of indicating the origin of the "claim of right" of his grantor, or as a separate, complete and sufficient defense, defendant pleads and maintains that his claim is prior in time and superior in right to plaintiffs', and, these averments being consistent, it becomes immaterial as to which is intended. A similar allegation relative to priority of their appropriation is made and urged by plaintiffs. This feature, being essential to a complete determination of the effect of the question of estoppel under the issues and evidence relative thereto, will be considered. From the proof it appears that plaintiffs' rights, when considered with reference to their allegation of prior appropriation, independent of the Estes and Gordon deed, did not attach prior to 1875, if prior to 1884. Littlefield testified to having known the various farms on the creek continuously since 1862, and that he first saw ditches on plaintiffs' lands in 1875. The testimony of M. J. Hindman indicates that a garden was irrigated there in 1867, but from what source of water supply is not shown. The ditches observed, so far as appears, may have been constructed to catch the flow from springs testified to as being below defendant's points of diversion, some of which were on plaintiffs' lands.

It was incumbent upon plaintiffs, in order to avail themselves of this right, to clearly prove all the elements essential to a right under the doctrine of prior appropriation, and the evidence disclosed is insufficient to establish their diversion and appropri-

tion for that purpose earlier than 1884 (*Morgan v. Shaw*, 47 Or. 333: 83 Pac. 534), unless the deed referred to is sufficient. In fact, it is not clear that plaintiffs are endeavoring to show an actual appropriation of the stream sufficient to maintain their rights in this respect, earlier than that year, except to the extent shown by the color of title beginning with Estes' deed, already considered. The defendant, however, clearly and without question establishes a diversion for his lands not later than the year 1872, and shows the application thereof to a beneficial use at all times since. It cannot be doubted, therefore, that the appropriation claimed by defendant is prior in time to plaintiffs' appropriation; but it is maintained that defendant should be and is estopped, by reason of his grantor's deed to their predecessors, from pleading any right or claim to the use of any water from Washington Creek as against them, not only by adverse possession, as heretofore discussed, but from pleading a prior right to its use. Estoppel, as here urged, is evidently based on the assumption that defendant, in relying on his claim as prior appropriator, does so on the theory that he obtained his right to divert the water by reason of the interest sold to Smith in 1864, which had its inception in the appropriation made on the Estes farm in 1863. Owing to there being no privity of estate between Estes and Smith, this claim cannot be maintained (*Low v. Schaffer*, 24 Or. 239: 33 Pac. 678); but, notwithstanding Estes cannot tack his appropriation to Smith's rights, the diversion in his own right, as above stated, attached prior to that of defendant.

18. We are then confronted with the question: Can the defendant, notwithstanding such deed, avail himself of his claim in this respect? The doctrine of estoppel is intended to preclude fraud, and to that end imposes silence on a party, when in conscience and honesty he should not be allowed to speak: *Van Rensselaer v. Kearney*, 52 U. S. (11 How.) 297 (13 L. Ed. 703). As usually understood and applied, estoppel can be used only that the ends of justice may be subserved.

19. Then, when it is remembered that Estes and Dill conveyed only their inchoate title to the waters of Washington Creek,

which consisted only of such rights as a notice of location there-of could give, which, so far as appears from the record, was but a claim of right requiring due diligence for its complete development, they transferred by their deed all they were able to convey, and since, after receiving such conveyance, the grantees neglected or failed to perfect the right thus granted, can it then be said the ends of right and justice would be subserved by holding the grantors to account under their covenants of warranty for the failure of the grantees to perform a duty imposed upon them by law, and whose acts or nonaction the grantors could not control, and over which they had no supervision? We think not. To hold their grantors estopped to assert an after-acquired title, under such conditions, would be to make estoppel a weapon of injustice, rather than a shield to protect the wronged. When the deed was given, the grantors warranted that, up to that stage of the proceedings, there were no outstanding claims which could defeat the rights therein conveyed, if diligently perfected. The grantors warranted that they would hold up their end of the log, but not that the grantees would not let theirs fall. At the date of the deed the legal title to both land and water was in the government. The grantors had but an inchoate right in each, and both were subject to forfeiture either by intentional abandonment or an act or failure to act, which the law implied as such. The long delay after 1864, whether for 5 years or 20, constituted an abandonment under the facts shown, and left all rights thus forfeited subject to an appropriation by others: *Seaweed v. Pacific Livestock Co.* 49 Or. 157 (88 Pac. 963).

Estes, in 1872, if not earlier, made such an appropriation as vested in himself a complete right to the use of the stream to the extent thus applied, and, unless estopped as claimed, the rights of plaintiffs' predecessors became subsequent to this title thus acquired by him, both in time and right; and it is immaterial whether he thought by his marriage to Mrs. Smith, in 1867, he succeeded to the interest of the heirs of her former husband, for he openly asserted and maintained his right as an appropriator, independent of any previous claim thereto. When the deed was executed to Gordon and Manville, the grantees knew, or were bound to know, as a matter of law, the extent of the title

conveyed; that the grantors had but an inchoate interest, requiring a duty to be performed on the part of the recipients, in order to carry into effect the right transferred to them—as much so as to the “squatter’s rights” to the land described in the deed, the forfeiture of which, under like circumstances, would not have precluded the grantors from asserting an after-acquired title thereto.

20. The adjudications on this question are not numerous, but we feel fully warranted by the principles enunciated in the few decisions bearing on the question, as well as by the reasonableness and justice of the rule, in holding that an after-acquired title by the grantor will not inure to the benefit of the grantee, where the latter knew at the time of the transfer that the grantor had no title and did not expect him to procure one, or where the title purported to be conveyed is an inchoate interest, the completion or forfeiture of which depends upon some acts to be performed, or diligence to be exercised by the grantee. We find no authorities to the contrary, and supporting this rule are *Viele v. Van Steenberg* (C. C.) 31 Fed. 249; *Goodel v. Bennett*, 22 Wis. 565; *Wallace v. Pereles*, 109 Wis. 316 (85 N. W. 371: 53 L. R. A. 644: 83 Am. St. Rep. 898); *Altemus v. Nickell*, 115 Ky. 506 (74 S. W. 221: 103 Am. St. Rep. 333). It follows that defendant is not estopped to claim either as an owner through his grantor by prior appropriation, or by adverse possession for the statutory period, and, when both claims are considered in connection with the facts disclosed, it conclusively appears that defendant has acquired a right to the use of sufficient water from Washington Creek to properly irrigate the amount of lands heretofore cultivated, amounting to not less than 60 acres.

21. As to the quantity of water, however, to which he is entitled for this purpose, it is not so clear. Witnesses for plaintiffs testify that their farms have consumed all the stream will furnish, when it could be procured, and that all of it has been and is necessary. Defendant and his witnesses also indicate that all has been necessary for and applied in the irrigation of his premises. In this respect they give only their opinion, without stating the facts from which their conclusions are inferred; but as it is shown, and not controverted, that the lands along Wash-

ington Gulch require from an inch to an inch and a half of water per acre for their proper cultivation it will be presumed that this amount is sufficient, and the apportionment will be on this basis, notwithstanding the opinion of defendant's witnesses that the Estes farm requires all the water in the stream. It being shown, and not questioned, that defendant has between 60 and 70 acres of land in cultivation, including orchard, upon which good crops have been raised each year, it will be assumed that a flow of 60 inches of water is ample for defendant's irrigation and domestic requirements: *Morgan v. Shaw*, 47 Or. 333 (83 Pac. 534).

22. The record is silent as to the quantity of water understood by the use of the word "inch"; but it has been held that, when the record fails to disclose the amount intended by such designation, it will be presumed that it was to be measured under a six-inch pressure: *Morgan v. Shaw*, 47 Or. 333 (83 Pac. 534); *Bowman v. Bowman*, 35 Or. 279 (57 Pac. 546). This designation, however, is not sufficiently definite to be a safe guide at all times in ascertaining when the rights of a person awarded a given number of inches under six-inch pressure, etc., are being invaded. In speaking of the measurements of water in use in California, Mr. William Kent, in his recent reference book for use by engineers and mechanics, states the situation thus: "The term 'miner's inch' is more or less indefinite, for the reason that California water companies do not all use the same head above the center of the aperture, and the inch varies from 1.36 to 1.73 cubic feet per minute each; but the most common measurement is through an aperture two inches high and whatever length is required, and through a plank $1\frac{1}{2}$ inches thick. The lower edge of the aperture should be two inches above the bottom of the measuring box and the plank five inches above the aperture, thus making a six-inch head above the center of the stream. Each square inch of this opening represents a miner's inch (under six-inch pressure) which is equal to a flow of $1\frac{1}{2}$ cubic feet per minute." See, also, Wiel, *Water Rights*, pp. 147, 175; Newell's (Practical) *Irrigation*, p. 128; Troutwine, *Civil Engineering*, p. 546; Merriman's *Treatise on Hydraulics* (1904) pp. 122,

123, 124; Mill's Irr. Manual §§ 88-92, inclusive; *Dougherty v. Haggin*, 56 Cal. 522.

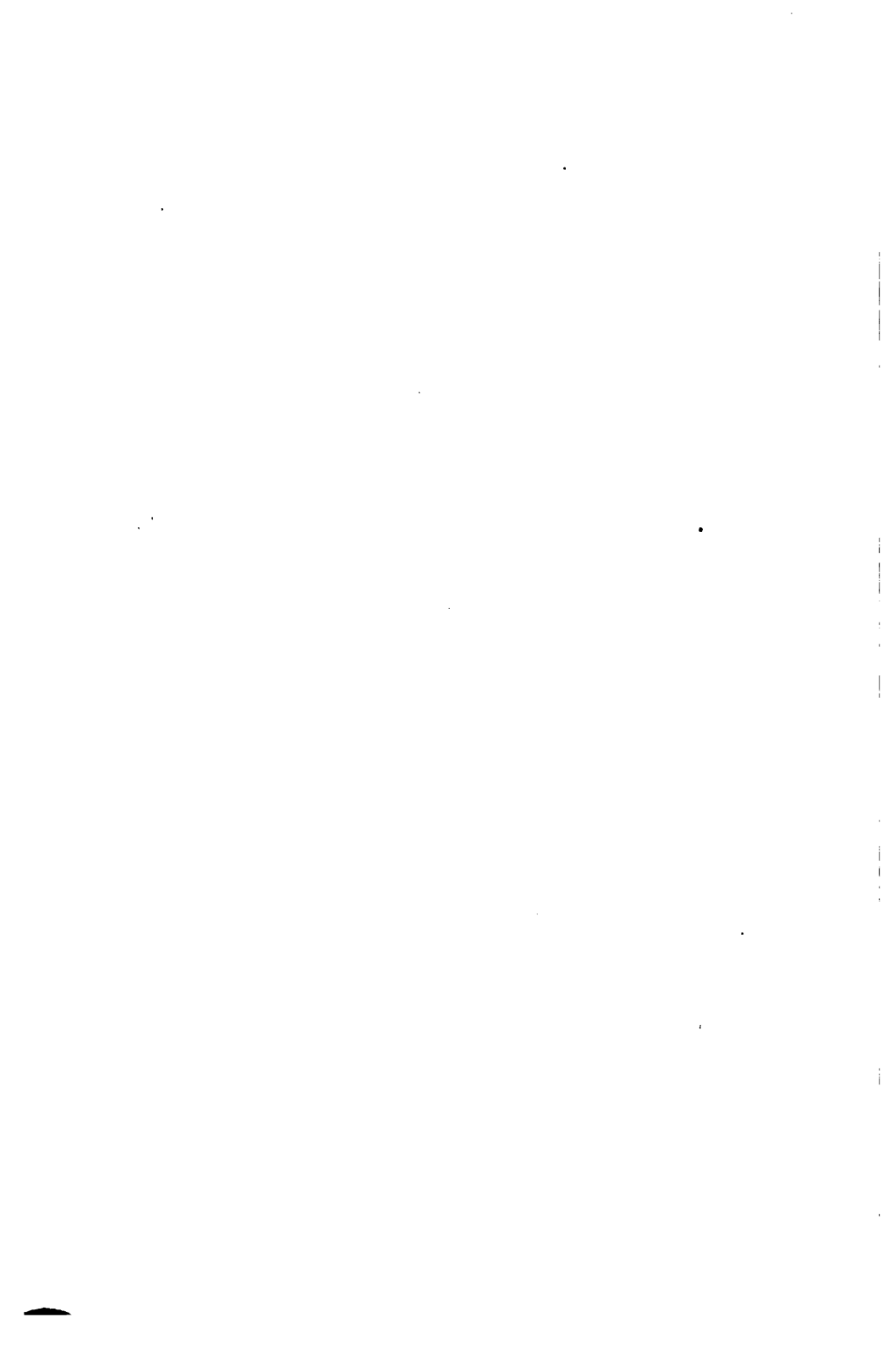
It is evident that the only reliable method by which any certain number of inches of water, when awarded under this method of measurement, can always be determined, is on the basis of what is termed by engineers as "second feet," or quantity of water flowing past a certain point in a given space of time. The ratio recognized by the authorities cited and rule quoted is that one inch of water under six-inch pressure equals one-fortieth of a "second foot"—that is, 40 miner's inches furnish a flow of water equal to one cubic foot ($7\frac{1}{2}$ gallons) per second of time—which ratio we find substantially accurate, and will be adopted here. "Inches" of water, when unexplained, having been determined to have reference to the quantity so designated under six-inch pressure (*Bowman v. Bowman*, 35 Or. 279: 57 Pac. 546), it follows that defendant, having from 60 to 70 acres of cultivated land requiring irrigation, is entitled as a first right to the use of 60 inches of the waters of Washington Creek for irrigation and domestic use.

23. As to any water in excess of his actual requirements, as here awarded, including the quantity of water that may pass below defendant's lands after its use thereon, plaintiffs have acquired a right thereto, at such times as needed by them for the purposes stated, as against defendant: *Seaward v. Pacific Livestock Co.* 49 Or. 157 (88 Pac. 963). And, as between the parties, plaintiffs and defendant herein, at all times that the water is not required by one of them, it should be at the disposal of the other, for irrigation and domestic use, when needed: *Mann v. Parker*, 48 Or. 321 (86 Pac. 598).

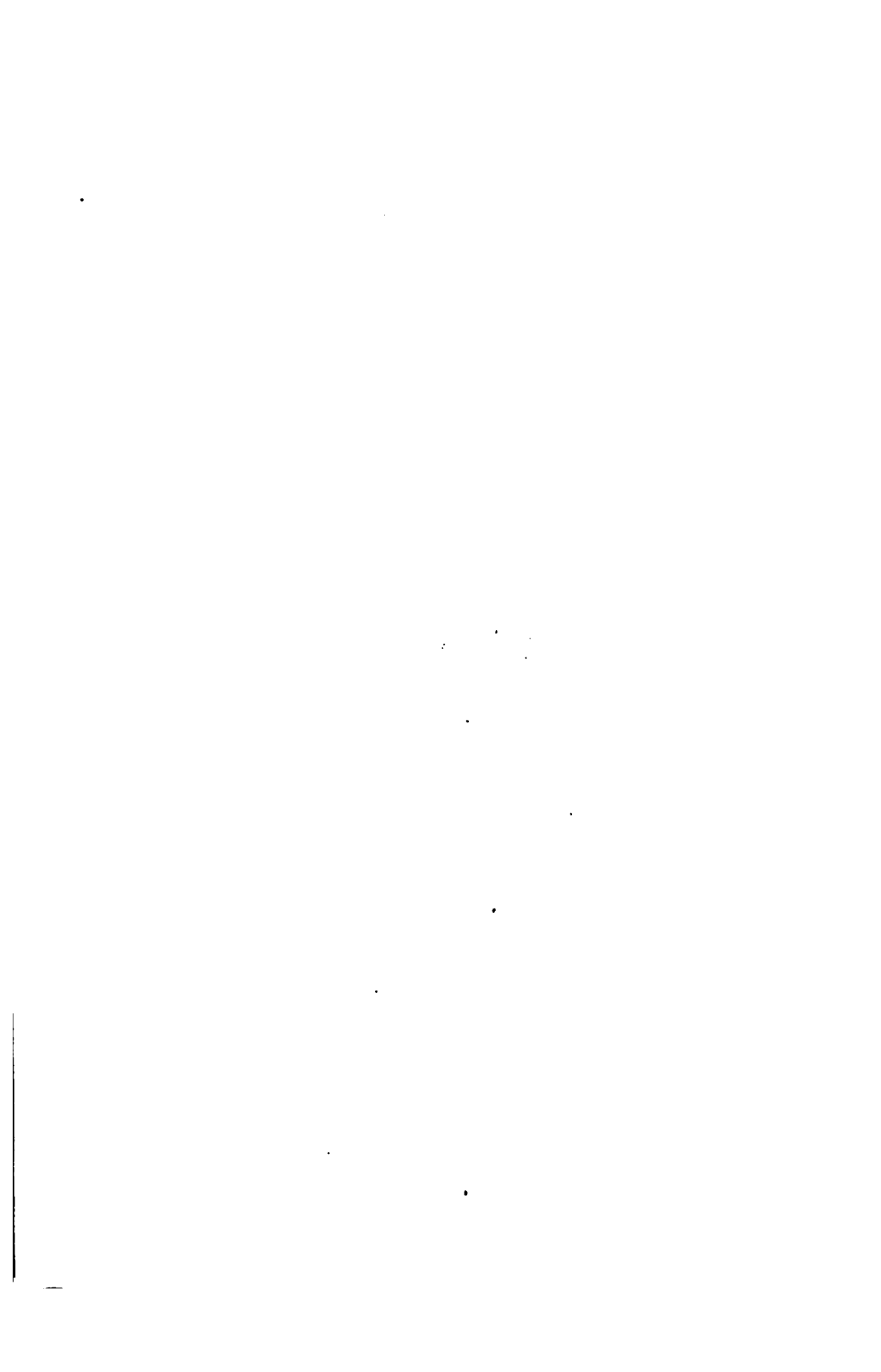
24. The trial court being invested with discretionary powers in taxation of costs, in the exercise of which there appears no abuse, the decree in that respect should not be disturbed; but the cross-appeal appearing justifiable on the part of defendant, he should be allowed his costs in this court.

The decree of the circuit court should be modified and one entered in conformity with this opinion. **MODIFIED.**

Mr. Justice EAKIN having tried the cause in the court below did not sit in this case.



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Gardner v. Wright, 609.

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- Contempt—Amendment Must Be Verified. See CONTEMPT, 3.
 Amending by Making More Definite—Applies Only to Existing Defects and Not to Omitted Matters. See PLEADING, 12.
 Allowance of During Trial. See PLEADING, 1, 2.

APPEALABLE ORDER. See APPEAL, 28, 30.

APPEAL AND ERROR.

TIME FOR FILING TRANSCRIPT—EFFECT OF STIPULATION.

1. The filing of the transcript within the time allowed by law, or an extension thereof properly obtained and entered of record before the expiration of the time previously allowed, is jurisdictional and its omission cannot be excused. A stipulation for additional time is not equivalent to an order granting such time. *Davidson v. Columbia Timber Co.* 577.

SAME—ORDER NUNC PRO TUNC.

2. Where no order was granted by the trial judge on a stipulation extending the time for the filing of a transcript on appeal until after the time fixed by law had expired, the court had no power thereafter to grant an order extending such time to the date fixed in the stipulation by directing that the same be entered *nunc pro tunc* as of the date of the stipulation. *Davidson v. Columbia Timber Co.* 577.

APPEAL IN EQUITY—EFFECT OF AS SUPERSEDEAS.

3. The supersedeas effect of a bond for costs in an appeal from a decree is considered but not decided. *State ex rel. v. Small*, 595.

PAYMENT OF FINE PENDING APPEAL.

4. The rule that the voluntary payment of judgment pending an appeal operates as a satisfaction of the judgment applies to both civil and criminal cases, and no appeal can be taken from a judgment imposing a fine after the amount has been deposited with the clerk, even if such deposit was made under protest and solely to prevent being put in jail after the trial judge had refused to grant a stay of execution or fix the amount of bail, there being no statute in Oregon providing for the deposit of the amount of a fine pending an appeal. *Washington v. Cleland*, 12.

MOTION FOR RULE TO SUPPLY DEFECTIVE RECORD—SUPPORTING EVIDENCE.

5. A motion to require alleged omissions in a record to be supplied should be accompanied by some showing that the facts justify the action asked. *State v. Connolly*, 406.

SAME—PROPER DENIAL OF MOTION.

6. A motion to complete a diminished transcript by adding the facts regarding the giving of notice of appeal, is discreetly denied where there is no showing that any such notice was actually given or any entry concerning it made in the records of the trial court. *State v. Connolly*, 406.

ILLUSTRATION OF ADVERSE PARTY.

7. Where certain land on which plaintiff attempted to impose a lien had been sold under a bond for a deed, and the vendors successfully contested the rights of the vendee in the premises, and also defeated plaintiff's claim of lien, such vendee is an adverse party on whom notice of appeal taken by plaintiff must be served. *Kramer v. Marsh*, 417.

POINTS NOT PRESENTED TO THE TRIAL COURT.

8. In cases of contempt, objections to the form or sufficiency of the writ of arrest must be presented to the trial court or they cannot be considered on appeal. *State ex rel. v. Sieber*, 1.

SAME—DEFAULT THROUGH OVERSIGHT—WAIVER BY NOT OBJECTING.

9. A default judgment ought not to be entered against a party who has presented an issue on any material point in the case, but if such an order is entered, counsel must within a reasonable time call the error to the attention of the trial court, otherwise it will be considered waived—it is not an error that can be first presented on appeal. *Heilner v. Smith*, 14.

OBJECTIONS IN LOWER COURT—SPECIFIC PERFORMANCE.

10. A complaint for the specific performance of a contract of employment which, after stating the time and object of the employment, alleges that it was stipulated that the employee should be paid at a specified rate per month, and that in consideration thereof he agreed to design such machinery as might be required and to give the employer the benefit of the best of his knowledge, and that in consideration of the employment, any improvements which the employee might conceive should become the property of the employer, is sufficient, when attacked for the first time on appeal, as against the objection that the employment and not the salary was the consideration for the agreement as to the ownership of the improvements which the employee might conceive, and that such employment was not a sufficient consideration. *Portland Iron Works v. Willett*, 245.

UNANSWERED QUESTION—STATEMENT OF EXPECTED ANSWER.

11. Where the form of a question to which objection is made does not disclose the answer expected, and no statement on that point is made by counsel, the action of the court in sustaining such objection is not reviewable, since no error appears in the record.

Baines v. Coos Bay Navigation Co. 192.

REVIEWING RULING ON CHALLENGE TO JUROR FOR BIAS.

12. The disallowing of a challenge for cause to a juror who was then peremptorily challenged will not be reviewed where the challenger was not obliged subsequently to accept an objectionable juror, which cannot happen until the peremptory rights have been exhausted and a disqualified juror is then forced upon him over objection. *State v. Megorden*, 259.

REMANDING WITH DIRECTION AS TO JUDGMENT.

13. In an action tried without a jury, where the material facts have been determined, but the conclusions are erroneous, the better practice is to remand the case with directions to enter a correct judgment rather than for a new trial.

Miles v. Bowers, 429.

NECESSITY OF ERROR APPEARING IN THE RECORD.

14. Timely and proper exceptions must be taken in the trial court and properly preserved in the record on appeal before error predicated on instructions will be considered on appeal.

State v. Megorden, 259.

FINDINGS BY COURT—REVIEWING SUFFICIENCY OF EVIDENCE.

15. The appellate court will examine the evidence in an action tried without a jury only to the extent of determining if there is any competent support for the findings, it will not review the weight or sufficiency of the evidence.

Seffert v. Northern Pacific Ry. Co. 95.

DUTY TO MAKE FINDINGS IN LAW ACTIONS.

16. The findings in a law action tried by the court must cover all the material issues and they must be made by the trial judge; the supreme court cannot decide the proper deductions to be drawn from conflicting evidence.

Fischer v. Cone Lumber Co. 277.

DISCRETION IN ALLOWING AMENDMENTS.

17. The discretion of the trial court as to allowing an amendment to a pleading during trial is not subject to review in the absence of a manifest abuse. *Longfellow v. Huffman*, 486.

HARMLESS ERROR—CUMULATIVE EVIDENCE OF HANDWRITING.

18. In a prosecution for assault with intent to kill, a poorly spelled letter, purporting to have been written by the defendant and relating to his prospective marriage, was admitted in evidence after testimony by the recipient that she discussed its contents with defendant after she had received it. No expert based his opinion as to the genuineness of another incriminating letter purporting to have been signed by defendant, on a comparison with the first letter, and the attention of the jury, who had before them numerous genuine samples of defendant's handwriting, was not particularly called to such letter. *Held*, that, even if defendant's acknowledgment of the contents of the letter was not a sufficient admission of the genuineness of the penmanship to permit its use as a standard of comparison by an expert, yet its admission before the jury could have caused no appreciable injury to defendant. *State v. Branton*, 86.

HARMLESS ERROR—PLEADING—STRIKING OUT.

19. Where a defective defense which should have been attacked by demurrer is struck out on motion and no injury results, the error is not prejudicial. *Morse v. Odell*, 118.

HARMLESS ERROR—IMPROPERLY SUSTAINING DEMURRER.

20. Where a demurrer to a defense is erroneously sustained, but the evidence which would have been admitted to sustain the defense is admitted in connection with another issue, the error is harmless. *Morse v. Odell*, 118.

PERSONAL INJURIES—EVIDENCE AS TO EXISTENCE AND NUMBER OF PLAINTIFF'S FAMILY NOT HARMLESS.

21. In a personal injury case evidence that plaintiff had a family, consisting of a wife and children, is irrelevant and improper, and the error is not rendered harmless by the statement of the court, on overruling an objection to the evidence, that plaintiff could not recover anything by reason of his having a family, but that the evidence was competent as showing the conditions which might affect his mental feelings, nothing further in the way of instructions or otherwise having been done in regard to the evidence. *Warner v. DeArmond*, 199.

PRESUMPTIONS—TRIAL.

22. Where a court has made findings in accordance with the averments of the complaint, ignoring an amended answer, and certified in the bill of exceptions that the parties introduced evidence maintaining the allegations of their pleadings, the court on appeal must conclude, in view of the presumption under B. & C. Comp. § 788, subd. 15, that official duty has been regularly performed, that no permission was granted to file the amended answer, though it stated that it was filed by leave of court. *Freeman v. Preston*, 175.

SAME—RECORD—SUFFICIENCY.

23. Where the abstract on defendant's appeal did not contain a reply to an amended answer, which could not have been interposed without leave of court, it devolved on defendant to set out the order granting leave, and on his failure to do so he could not complain that the court erred in ignoring the amended answer. *Freeman v. Preston*, 175.

PRODUCTION OF LETTER—PRESUMPTION AS TO RULING OF TRIAL COURT.

24. The bill of exceptions as to the admission of secondary evidence of the contents of a letter, demand for production of which was made on defendant at the trial, being silent on the subject, it will be presumed that the evidence disclosed that defendants had sufficient time for production of the letter.
Scott v. Christenson, 223.

RECORD—EVIDENCE DEhors.

25. Matters not in the record and of which the court is not authorized by statute to take judicial notice cannot be considered for any purpose. Where the proceedings before a commission appointed to prepare a city charter, and an explanatory note issued by the commission to the voters at the time the charter was adopted, are not a part of the record on appeal, they cannot be considered in determining the construction of a provision of the charter.
Landswick v. Lane, 408.

SUBSEQUENT APPEALS—LAW OF CASE.

26. Where the testimony on an issue is substantially the same as that given at a former trial, the conclusion reached in regard to it on such former trial is the law of the case.

Baines v. Coos Bay Navigation Co. 192.

DUTY OF COURT IN DETERMINING MOTION FOR NEW TRIAL.

27. The trial judge should grant a new trial, if in his opinion the evidence is insufficient in law or fact to support the verdict, or the verdict is unjust.
Multnomah County v. Willamette Towing Co. 204.

REVIEWING ORDER GRANTING NEW TRIAL—DISCRETION OF LOWER COURT.

28. Granting a new trial is within the sound discretion of the court, and will not be disturbed on appeal, where there is a substantial conflict in the testimony on essential facts.

Multnomah County v. Willamette Towing Co. 204.

APPEAL AFTER SECOND TRIAL—REVIEWING FIRST TRIAL.

29. Where a new trial is awarded, errors committed on the first trial will not be considered on appeal from the second trial.

Multnomah County v. Willamette Towing Co. 204.

REVIEW—ORDER FOR NEW TRIAL.

30. The granting of a new trial is an interlocutory order involving the merits and is reviewable on appeal from the judgment on the new trial.

Multnomah County v. Willamette Towing Co. 204.

APPLIANCES.

Duty of Master as to Furnishing Most Approved. MASTER & SERVANT, 2.

APPROPRIATION. See WATERS, 14-18.

ARBITRATION AND AWARD.

JURISDICTION TO ENJOIN ENFORCEMENT OF AWARD BASED ON FRAUD.

1. An award based on the fraud or perjury of the prevailing party will be set aside in equity and its enforcement permanently enjoined, a distinction being recognized between the dignity of a judgment and an award.
Fire Association v. Allesina, 316.

ARBITRATION AND AWARD—EVIDENCE OF FRAUD.

2. The evidence shows that the successful party to the arbitration in question presented to the arbitrators evidence that he knew to be false and that materially affected the award.

Fire Association v. Allesina, 316.

AWARD AS EVIDENCE—PARTICULAR ISSUES—DIFFERENT PARTIES.

3. In an action to recover for injury to a bridge by a passing vessel in which the owners of the vessel were not parties, an award by arbitrators in a controversy between the owners and defendant lumber company, the charterer, is not admissible in evidence; the parties being different, and the matter of the award not being the same as that of the action. *Multnomah County v. Willamette Towing Co.* 204.

ARREST.

Discretion as to Nature of Order to Be Issued. See CONTEMPT, 4.
Objections to Warrant Must Be Specific. See CONTEMPT, 5.

ASSUMING FACTS.

Instruction Invading Province of Jury. See CRIMINAL LAW, 13.

ATTORNEY AND CLIENT.

PUNISHMENT FOR PERJURY—EXTENUATING FACTS.

1. Although the commission of the crime of perjury involves moral turpitude justifying the removal of an attorney, under Section 1067, B. & C. Comp., the facts in this case do not require so extreme a penalty, and a suspension for ninety days will accomplish the purpose of the law.

Ex parte Tanner, 31.

FORGERY AS GROUND FOR DISBARMENT OF ATTORNEY.

2. An attorney who has forged applications to purchase state lands, has signed fictitious names to assignments of applications, and attached thereto false notarial certificates, is guilty of willful misconduct in his profession, and should be permanently disbarred, and his low estimate of professional integrity is further emphasized by a plea that he believed that the applications and affidavits thereto were antiquated matters of form not binding on account of long disregard by school boards, and that he believed that he was doing the state a favor in assisting it to dispose of its lands.

Ex parte Turner, 227.

Mortgage Foreclosure—Duty to Follow Testimony. MORTGAGES, 8.

BASE for Lieu Land Selections.

Effect of Approval and Certification of Indemnity Lists on Right to Again Use Base Already Exchanged. See PUBLIC LAND, 1.

BIAS of Juror. See APPEAL, 12; JURY, 2, 3.

BILL OF EXCEPTIONS.

ATTACHING EVIDENCE BY REFERENCE.

Where the bill of exceptions does not include within itself any part of the evidence in the case, but contains a statement that the testimony and certain documents designated as exhibits are annexed to and made a part of the bill, and for the purpose of identification are locked in several trunks and delivered to the clerk of the court with instructions to transmit them to the clerk of the appellate court, neither the evidence nor the exhibits being physically attached to the bill, or certified or identified by the trial judge, such evidence and exhibits are not properly in the record, and should not be considered.

Multnomah County v. Willamette Towing Co. 204.

BILLS AND NOTES.

EFFECT OF SIGNING AS SURETY.

1. One of several signers of a promissory note does not affect his primary liability thereon by adding the word "surety" to his signature, though it may affect the relative rights of the signers between themselves.

Cellers v. Meachem, 186.

EFFECT OF SIGNING AS "TRUSTEE."

2. The personal liability of the signer of a promissory note is not affected by the addition of the word "trustee," after his name.

McLeod v. Despain, 536.

EFFECT OF WORD "TRUSTEE" IN WRITING.

3. The appearance of the word "trustee," added to a payee's name in a note, is sufficient to put persons dealing with such trustee upon inquiry, and, in the absence of inquiry, they will be presumed to have known what they might have discovered.

McLeod v. Despain, 536.

VALIDITY OF COMPROMISE AGREEMENT—CONSIDERATION FOR NOTE.

4. Under the general rule that voluntary compromise settlements of disputed claims will be sustained where they are made with mutual knowledge of the facts, and in good faith to avoid litigation, a court will not inquire into the validity of a lien to avoid the foreclosure of which the president and general manager of the corporation against which it was filed gave the corporate note. The note being for less than the sum claimed, and the lien having been released, there was a sufficient consideration.

Baines v. Coos Bay Navigation Co. 192.

ACCOMMODATION MAKER—KNOWLEDGE OF HOLDER.

5. That a joint maker of a negotiable note signed solely for the accommodation of his comaker, which was known to a transferee when he purchased, is not a defense, under the Negotiable Instruments Act: B. & C. Comp. § 4431.

Cellers v. Meachem, 186.

LIABILITY OF ACCOMMODATION MAKER AFTER EXTENSION OF TIME WITHOUT HIS KNOWLEDGE.

6. Under the Negotiable Instruments Act (Laws 1899, pp. 18, 44, B. & C. Comp. §§ 4431, 4521, 4522, 4592), defining an accommodation maker, and making him liable on the instrument to a holder for value, and providing that a negotiable instrument is discharged by payment, etc., an accommodation maker of a note is not relieved from liability by an extension of time of payment without his consent.

Cellers v. Meachem, 186.

COMPETENCY OF EVIDENCE OF PAYMENT.

7. In an action against several makers of a note, the testimony that one of the makers paid to the witness, who was authorized to receive it, a stated sum at a stated time, is competent, though the witness is not certain which maker made the payment.

Scott v. Christenson, 223.

RIGHTS OF SURETY AS TO PRINCIPAL AFTER PAYMENT.

8. Where the plaintiff had been a surety on a note, but subsequently bought it, the assignment to him was not a discharge of the note, but entitled him to be subrogated to the rights of the creditor against his principal, and to foreclose a mortgage given to secure the note.

Marsters v. Umpqua Oil Co. 374.

DISCHARGE OF SURETY BY EXTENDING TIME FOR PAYMENT.

9. Where a payee of a note grants an extension of time for payment thereof to a principal debtor, without the consent of its sureties, the sureties are discharged from liability, not only to the payee, but to those who take by assignment from him after maturity.

Hoffman v. Habighorst, 379.

LIMITATIONS—INDORSEMENT OF PART PAYMENT.

10. An indorsement on a note, purporting to acknowledge receipt of money, is admissible in evidence in favor of the party making it, to repel the presumption of the bar of limitations, on his testifying that one of the joint makers paid the money to him to be credited on the note.

Scott v. Christenson, 223.

EXAMPLE OF AN ANSWER NOT STATING FAILURE OF CONSIDERATION.

11. An answer in an action on notes given for the price of a mining claim, which alleged that the claim had been located by a third person since deceased; that the makers desired to purchase the claim; that the payee represented that he was the owner and entitled to the possession thereof, and that he agreed to convey the same to the makers; that, when the representations were made, the makers found that the deed from the third person as recorded erroneously described the claim; that the payee represented that the deed executed to him by the third person correctly described the claim; and that the error resulted from an error committed in recording the deed, without alleging that the payee agreed to deliver to the makers the deed executed by the third person, or averring that the payee promised that he would have the deed re-recorded, was insufficient on demurrer for, if the third person's deed was not to be re-recorded, any representations made by the payee to the makers as to how the error in the description occurred, however false, were immaterial.

Leedy v. Wood, 50.

BLIND MAN.

Execution of Will by—Witnessing. See WILLS, 2.

BONDS.

ESTOPPEL ON SURETY TO DENY SIGNATURE.

Where a surety signed a bond and delivered it to the principal on condition that another surety be secured, and the bond, regular in appearance, was delivered to the obligee without mention of the condition, the surety is estopped to deny the validity of his act, the obligee having disadvantageously changed his position in consequence of receiving the bond.

Wollenberg v. Sykes, 163.

BOOKS OF ACCOUNT.

Competency—Self Serving Declarations. See EVIDENCE, 10.

BOUNDARIES.

NATURE OF SURVEYOR'S EVIDENCE.

1. In testifying as to the location of points in public surveys, it must be remembered that surveyors are only witnesses, and they should confine their testimony to what acts they performed, leaving the conclusion as to the location of the point to the jury, and the court can determine, as a matter of law, whether they have pursued the correct method in the survey.

Seabrook v. Coos Bay Ice Co. 237.

MANNER OF LOCATING CORNERS.

2. Where, on an issue as to the location on the ground of the boundaries of a tract of tide lands, the description in the deed called for a place of beginning a certain number of chains northward from a "post at angle in meander line" and it was then stated that the post was a certain number of chains north from a certain corner of "lot No. 2 in section 26," etc., the proper method was to find the angle post, and, if lost or obliterated, to find it from some known corner and not to fix a starting point according to the number of chains mentioned from the corner of the lot.

Seabrook v. Coos Bay Ice Co. 237.

CALLS CONTROL MEANDER LINE.

3. A deed of tide land by the state described by metes and bounds conveys the territory within the calls, which are not controlled by the meander lines of the original United States survey, though one of the calls is "thence along the meander line," it being presumed that the line thus referred to means the actual high water mark, rather than the line of the government survey. *Seabrook v. Coos Bay Ice Co.* 237.

PURPOSE OF MEANDER LINES.

4. In surveying fractions of government land adjoining navigable waters, the meander line is not intended to mark the boundary, but only to indicate the winding lines of the banks.

Seabrook v. Coos Bay Ice Co. 237.

BRIEFS.

Test Is Actual Expense of Printing. See COSTS, 1.

BURDEN OF PROOF.

Probating Will in Common and in Solemn Form. See WILLS, 4.

Granting Injunctions—Practice. See INJUNCTION, 2.

Drunkenness—Fraud in Sale of Land. See VEND. & PUR. 2.

To Show Contents of Lost Will. See WILLS, 7.

To Show Revocation of Executed Will. See WILLS, 9.

To Show Mutual Mistake in Contract. See REFORM. OF INST. 1.

To Establish Payment Avoiding Statute. See LIM. OF ACTIONS, 2.

To Sustain Validity of Tax Deed. See TAXATION, 7.

To Establish Exclusive Occupancy. See ADVERSE POSSESSION, 8.

To Establish Claim of Prior Appropriation. See WATERS, 14.

CALLS in Deed.

Relative Importance of Calls and Meander Lines. See BOUNDARIES, 3.

CANCELLATION OF INSTRUMENTS.

FRAUD—CASE UNDER CONSIDERATION.

1. The evidence is ample to sustain the finding of the trial court that the deed executed by S. V. Groesbeck and wife to T. J. Groesbeck on April 2, 1902, was induced by fraud and undue influence and while S. V. Groesbeck was so mentally incapacitated as to be incapable of understanding his conduct, and said deed was properly canceled at the suit of the other children of S. V. Groesbeck. *Groesbeck v. Groesbeck*, 113.

CANCELLATION OF INSTRUMENTS—NEED OF RETURNING CONSIDERATION.

2. The object of returning the consideration received before setting aside a transfer for fraud is to place the parties as they were before the occurrence, and where the grantee has received during his possession an amount equal to what he paid, there is no occasion to return the consideration as a condition precedent to maintaining suit.

Groesbeck v. Groesbeck, 113.

Judgment in Forcible Entry and Detainer Not a Bar. JUDGMENT, 7.

CARRIERS.

WHO ARE PASSENGERS.

1. Plaintiff was the servant of one who had contracted with a railroad company, the contract requiring the railroad to transport the contractor's servants. When the road was sufficiently completed the company put on a train, consisting of a water tank car, some freight cars, and a passenger coach. When the conductor and crew of such train were preparing to take the locomotive and tank car to a certain place, the contractor requested the conductor to carry plaintiff there on the tank car, and while

riding thereon plaintiff was injured owing to the derailment of the train. There was a rule of the company forbidding freight conductors to allow passengers on freight cars. *Held*, that, under the facts, plaintiff was a passenger on the train. *Gray v. Columbia Central R. Co.* 19.

SAME—CONTRIBUTORY NEGLIGENCE.

2. It appearing that it was customary for the contractor's servants, when being carried in the performance of their duty, to ride on flat cars, etc., and that plaintiff had no knowledge of the rule in question, he was not guilty of contributory negligence.

Gray v. Columbia Central R. Co. 19.

DUTY TO PERSON VOLUNTARILY CARRIED—FARES.

3. One not a common carrier who voluntarily undertakes to transport another is responsible for injury to him resulting from negligence, whether the service was for a compensation or gratuitous.

Harvey v. Deep River Logging Co. 583.

IMPLIED AUTHORITY OF TRAINMEN.

4. Employees operating transportation appliances, such as engineers or conductors, cannot by virtue of their employment impose the liability of a carrier on their employer by permitting strangers to ride on their conveyances.

Harvey v. Deep River Logging Co. 583.

EVIDENCE OF CUSTOM TO CARRY PASSENGERS.

5. Testimony that the operating employees of a logging road using engine and trucks, and not engaged at all in the passenger business, were in the habit of permitting persons to ride thereon from point to point, and that such practice was open, long continued and notorious, and was within the actual knowledge of the manager, reasonably tends to show that the owner of the road expressly or impliedly consented to allowing persons to be so carried, thereby establishing the relation of passenger and carrier as to any person so conveyed.

Harvey v. Deep River Logging Co. 583.

CONTRIBUTORY NEGLIGENCE BY RIDING IN EXPOSED POSITION.

6. One riding with the implied consent of a logging company on its logging train, consisting of an engine and a logging truck, is not guilty of contributory negligence *per se* in riding on the truck, which was the place where persons usually rode.

Harvey v. Deep River Logging Co. 583.

RISKS ASSUMED BY PASSENGER.

7. One riding on the logging train of a logging company, with its implied consent, does not assume the risk of collision through its negligence with another of its trains, though he does assume the risks incident to the proper operation of that kind of a train.

Harvey v. Deep River Logging Co. 583.

CASES IN THE OREGON REPORTS Approved, Cited, Distinguished and Overruled in This Volume. Same as OREGON CASES.

CAUSA MORTIS. See GIFTS.

CHANGING VENUE. As to Discretion. See VENUE.

CHARGING JURY. Same as INSTRUCTIONS TO JURIES.

CHARTER PARTY.

Construction of—Liability for Negligence. See SHIPPING, 2.

CHARTERS OF CITIES.

Portland, 1903, § 72,	pp. 61, 70.
§ 73, subd. 49,	pp. 61, 70.
§ 155,	pp. 530, 533.
§ 163,	pp. 408, 411.
§ 306,	pp. 530, 532.
§ 309,	pp. 534, 535.
§ 314,	pp. 534, 535.
Salem, 1889, § 6, subd. 28,	pp. 301, 302.

CITIES. Same as **MUNICIPAL CORPORATIONS.**

CITY CHARTERS. Same as **CHARTERS OF CITIES.**

CITY ORDINANCES. Same as **ORDINANCES OF CITIES.**

CIVIL SERVICE. See **MUNICIPAL CORPORATIONS**, 2, 3, 4.

CLAIM AND DELIVERY. Same as **REPLEVIN.**

CODE CITATIONS. Same as **STATUTES OF OREGON.**

COLLATERAL ATTACK.

- Deed to Public Land. See **PUBLIC LANDS**, 3.
- Recorded Plat—Claim of Mistake. See **DEDICATION**, 3.
- Questioning Corporate Organization. See **CORPORATIONS**, 1.

COLOR OF TITLE.

- Effect of Occupation Without Color of Title. See **ADV. POSS.** 12.

COMMENCEMENT OF ACTIONS. Same as **LIMITATION OF ACTIONS.**

COMMERCIAL PAPER. Same as **BILLS & NOTES.**

COMMON CARRIERS. Same as **CARRIERS.**

COMMON LAW.

- Right to Refer to for Definitions of Offenses. See **CRIM. LAW**, 3.

COMPETENCY of Evidence. See **EVIDENCE**, 1-5.

COMPROMISE AND SETTLEMENT.

VALIDITY OF COMPROMISE AGREEMENT—CONSIDERATION FOR NOTE.

Under the general rule that voluntary compromise settlements of disputed claims will be sustained where they are made with mutual knowledge of the facts, and in good faith to avoid litigation, a court will not inquire into the validity of a lien to avoid the foreclosure of which the president and general manager of the corporation against which it was filed gave the corporate note. The note being for less than the sum claimed, and the lien having been released, there was a sufficient consideration.

Baines v. Coos Bay Navigation Co. 192.

CONCURRENT ACTS. See **SALES**, 1.

CONDITION PRECEDENT. See **SPECIFIC PERFORMANCE**, 1.

CONFIDENTIAL RELATIONS. See **WITNESSES**, 7.

CONSIDERATION.

- Need of Returning in Case of Rescission. See **CANCEL. OF INST.** 2.

CONSTITUTIONAL LAW.

DUTY TO FURNISH COPY OF CHARGE.

1. The right to demand the nature and cause of a criminal accusation, conferred by Const. Or. Art. I, § 11, must be asserted to be available as a ground of appeal.
- State ex rel. v. Sieber*, 1.

CONTEMPT—OBLIGATION OF DEFENDANT TO TESTIFY.

2. Section 670, B. & C. Comp., providing that in a contempt proceeding the court shall examine the defendant, does not violate Const. Or. Art. I, § 12, providing that no person shall be obliged to testify against himself in a criminal prosecution. *State ex rel. v. Sieber*, 1.

ERROR IN PRINTING OREGON CONSTITUTION.

3. In printing the Constitution of Oregon in the Bellinger & Cotton compilation of laws, the word "subject," in Art. IV, § 20, line 2, on page 41, has been made plural instead of singular as it appears in the original enrolled copy of the constitution. *Murphy v. Salem*, 54.

SELF-EXECUTING PROVISIONS.

4. A provision of the fundamental law is self-executing when it prescribes a rule, the application of which puts into operation the constitutional provision. *Acme Dairy Co. v. Astoria*, 520.

5. The Constitution of Oregon is self-executing in the particulars prescribed in Art. IV, § 1a, which is the initiative amendment relating to local and special municipal legislation. *Acme Dairy Co. v. Astoria*, 520.

CONTROL OF LOCAL AND SPECIAL LEGISLATION.

6. Under Const. Or. Art. IV, § 1a, the authority to prescribe rules for the application of the initiative and referendum rights is not conferred upon cities or towns except as to municipal legislation, under the rule that the inclusion of one power excludes others.

Acme Dairy Co. v. Astoria, 520.

LOCAL AND SPECIAL LEGISLATION DEFINED.

7. The words "local" and "special," relating to municipal legislation, used in Const. Or. Art. IV, § 1a, which is the initiative amendment, are synonymous terms and mean enactments intended to affect only certain persons or things, or to operate in specified localities only.

Acme Dairy Co. v. Astoria, 520.

"MUNICIPALITY" AND "DISTRICT"—NATURE OF CITY CHARTER.

8. The terms "municipality" and "district," used in Const. Or. Art. IV, § 1a, reserving the initiative and referendum powers to the legal voters of municipalities and districts, are of the same import, meaning a district created from a designated part of the state and organized to promote those conveniences of the public at large which are inherently local and special.

Acme Dairy Co. v. Astoria, 520.

CREATION AND AMENDMENT OF MUNICIPAL CHARTERS.

9. Const. Or. Art. XI, § 2, as amended in 1906, prohibits the legislature from enacting, amending, or repealing any municipal charters, and grants to the legal voters of each city and town the power to enact and amend their charter, but does not grant the right of repeal.

Acme Dairy Co. v. Astoria, 520.

EXTENT OF INITIATIVE POWER CONFERRED ON MUNICIPAL CORPORATIONS.

10. The authority to provide the manner of exercising the initiative power as to municipal legislation, reserved to the legal voters of municipalities by the amendment of 1906, Section 1a, to Const. Or. Art. IV, extends to the manner of amending the charters of cities as well as their ordinances.

Acme Dairy Co. v. Astoria, 520.

CONSTITUTION OF OREGON.

- Article I, § 11, pp. 2, 8, 11, 259, 265.
- § 12, pp. 2, 10.
- Article IV, § 1, pp. 42, 46.
- § 1a, pp. 520, 523, 524.
- § 20, pp. 54, 57, 58.
- § 28, pp. 43, 45.
- Article V, § 14, pp. 232, 234.
- Article VII, § 11, p. 294.
- § 12, pp. 294, 296.
- Article XI, § 2, pp. 353, 356, 357, 520, 524.
- § 5, pp. 55, 59.

CONTEMPORANEOUS AGREEMENTS. See CONTRACTS, 10.

CONTEMPT.

AFFIDAVIT CONSTRUED AS A COMPLAINT.

1. The practice in Oregon in construing charges of contempt is more strict than formerly, and such a charge must now be made on the positive statement of the affiant, such affidavit being considered a complaint, to be governed by the rules of pleading, one of which is that the evidence must be limited to the allegations. *State ex rel. v. Sieber*, 1.

PLEADING—ALLEGATIONS AND PROOFS.

2. Where an affidavit filed in contempt proceedings charges defendant with violating an injunction commanding him not to interfere with the flow of water in a certain stream, the violation consisting of the erection of dams, it is error to admit evidence to show that defendant violated the injunction by cutting a ditch and turning water on his premises, for the defendant may thus be convicted of an act of contempt of which he has not been notified. *State ex rel. v. Sieber*, 1.

AMENDING AFFIDAVIT—DISCRETION.

3. Where the affidavit initiating a contempt proceeding is not sufficiently specific as to the charge, it may, with the court's consent, be amended, but must then be reverified. *State ex rel. v. Sieber*, 1.

PROPRIETY OF ARREST—DISCRETION.

4. Under Section 665, B. & C. Comp., providing that, on the filing of an affidavit stating the facts constituting a contempt, the court may either make an order on the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person before the court in the first instance, the selection of the procedure is discretionary with the court. *State ex rel. v. Sieber*, 1.

WAIVING IRREGULARITY IN WARRANT OF ARREST.

5. Although Section 668, B. & C. Comp., provides, in relation to the punishment of contempts, that the warrant of arrest shall direct whether the person charged may be let to bail, and, if so, the amount necessary therefor, or specify that he be detained without bail, the omission of such provisions is an irregularity only, and does not affect the validity of the warrant. The defect should be particularly indicated to the trial court or it is waived and cannot be urged on appeal. *State ex rel. v. Sieber*, 1.

DUTY TO FURNISH COPY OF CHARGE—CONSTITUTION.

6. Although Const. Or. Art. I, § 11, provides that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, the right must be affirmatively demanded

and refused to be available as a ground for appeal, the mere failure to deliver to defendant a copy of the charge is not sufficient.

State ex rel. v. Sieber, 1.

VIOLATING INJUNCTION—SUFFICIENCY OF AFFIDAVIT.

7. Although Section 663, B. & C. Comp., in relation to the punishment of contempts, provides that every court has power to punish contempt by fine or imprisonment, or both, but that it must appear that the right or remedy of a party to an action was defeated or prejudiced by the contempt before it can be punished otherwise than by a fine, in a proceeding for contempt, consisting of the violation of an injunction, an affidavit setting out the facts done in violation of the writ, and alleging that defendant had knowledge of the terms and conditions of the restraining order, is sufficient without alleging a demand on defendant to obey the injunction and cease violating its terms.

State ex rel. v. Sieber, 1.

SAME—ALLEGING SEVERAL OFFENSES.

8. In a proceeding for a contempt consisting of the violation of an injunction restraining defendant from interfering with a certain stream, an affidavit charging that defendant had erected two dams in the stream above affiant's headgate does not necessarily charge the commission of more than one offense.

State ex rel. v. Sieber, 1.

WITNESSES—PRIVILEGE OF EXEMPTION FROM TESTIFYING—CONSTITUTION.

9. Section 670, B. & C. Comp., providing that in a contempt proceeding the court shall examine the defendant, is not unconstitutional as compelling a defendant to testify against himself in a criminal prosecution, as forbidden by Const. Or. Art. I, § 12, since no form of contempt proceeding is a "criminal prosecution" within the meaning of that provision of the constitution.

State ex rel. v. Sieber, 1.

DEGREE OF PROOF REQUIRED.

10. In a proceeding for a contempt of court consisting of a violation of an order or process, the proof must be very clear.

State ex rel. v. Small, 595.

CONTINUANCE.

DISCRETION.

The discretion of a trial court in disposing of a motion for a continuance will not usually be reviewed, particularly where the manifest purpose of the motion is to delay the case until the happening of other anticipated events that would disqualify an important witness.

State v. Luper, 605.

CONTRACTS.

EFFECT OF REFUSAL BY ONE PARTY.

1. A declaration by one party to a contract, made prior to the time fixed for performance, that he will not comply with the contract, may excuse an offer to perform by the other party before bringing action for a breach, but it will not excuse him from being able to perform his part.

Longfellow v. Huffman, 486.

GENERAL RESULTS OF REPUDIATION.

2. The effect of a repudiation of a contract by a party thereto and the remedies available to the other party are discussed.

Longfellow v. Huffman, 486.

BENEFIT OF THIRD PERSONS—ASSUMING DEBTS.

3. Where a third party receives property in consideration of which he agrees to pay certain debts of his grantor, the owners of such debts at once obtain an additional right, that of suing the grantee; but such an agreement does not release the grantor.

Miles v. Bowers, 429.

REFORMING CONTRACT FOR DRUNKENNESS OF ONE OF THE PARTIES.

4. To avoid a contract on the ground of intoxication the party seeking relief must have been altogether incapable of understanding his action—
which was not the case here. *Fagan v. Wiley*, 480.

PUBLIC LANDS—SELECTION OF INDEMNITY SCHOOL LANDS—CONTRACT.

5. When the selection by a state of indemnity school lands has been approved and certified, the title thereto vests in the state if the general government is the owner of the premises, and the approval exhausts the bases offered in exchange, and hence the furnishing of a list of such lands is no defense in an action to recover money paid defendant to furnish a list of school lands, which, because of their mineral character, would entitle the state to select others in lieu thereof. *Morse v. Odell*, 118.

COMPETENCY OF EVIDENCE AS TO PROCEEDINGS ON BEHALF OF THE STATE IN THE GENERAL LAND OFFICE.

6. An agent of the state whose duty it is to attend to matters relating to selection of lands in lieu of mineral school lands is competent to prove that no further evidence was offered in, and no appeal taken from, decisions of the General Land Office, relating to such selections, and his evidence is admissible in an action to recover money paid to one who agreed to furnish a valid list of such lands, but whose list was rejected by the General Land Office. *Morse v. Odell*, 118.

EVIDENCE.

7. In an action to recover money paid on a contract with defendant to furnish a list of school lands, which, because of their mineral character, would entitle the state to other lands in lieu thereof, plaintiff having alleged a failure to furnish a valid list of lands and defendant having alleged that, if the list furnished proved invalid, he was to substitute other lands, which allegation plaintiff denied, the burden of proving this feature of the contract is on defendant, and it is his duty to offer to perform, and not that of plaintiff to demand, it. *Morse v. Odell*, 118.

HOPS—EXECUTORY CONTRACT.

8. A contract by a hop grower to sell a stated number of pounds of hops each year for a given number of years, to be grown on certain described real property, is an executory agreement for the sale of personal property, and no title passes to the purchaser until delivery and acceptance. *Bower v. Bower*, 182.

NEED OF RETURNING CONSIDERATION.

9. The object of returning the consideration received before setting aside a transfer for fraud is to place the parties as they were before the occurrence, and where the grantee has received during his possession an amount equal to what he paid, there is no occasion to return the consideration as a condition precedent to maintaining suit.

Groesbeck v. Grossbeck, 113.

EVIDENCE—CONTEMPORANEOUSNESS NOT DETERMINED BY DATES.

10. Papers relating to a stated transaction are all to be considered together, and the dates are not controlling. *McLeod v. Despain*, 536.

CONTRIBUTORY NEGLIGENCE. MAST. & SERV. 1; NEGLIGENCE, 1, 2.

CORNERS in Surveys.

Manner of Locating if Lost or Destroyed. See **BOUNDARIES, 2.**

CORPORATIONS.

RIGHT TO QUESTION LEGALITY OF CORPORATION.

1. The legality of the organization and existence of a *de facto* corporation that has exercised corporate powers can be questioned only by the state, and cannot be questioned collaterally in a suit between private parties.

Marsters v. Umpqua Oil Co. 374.

LIMIT OF RIGHT OF CREDITOR TO QUESTION PROCEEDINGS BY DIRECTORS FOR THEIR OWN BENEFIT.

2. The rule of law which disqualifies a director from binding a corporation by a transaction in which he has an adverse interest is for the protection of the corporation and its stockholders, as are the provisions of law and the by-laws of the company relative to meetings of directors, quorums, etc., and they cannot be invoked by any one else, since such transactions are merely voidable, and not void. An attack by a creditor on proceedings by which the directors have profited must always be on the ground of fraud, and that only.

Marsters v. Umpqua Oil Co. 374.

SAME—CASE UNDER CONSIDERATION.

3. In a suit to foreclose two mortgages against a corporation, a creditor who acquired a judgment lien on the mortgaged property subsequent to the recording of the mortgages was made a defendant. Plaintiff, as one of the directors of defendant corporation, had acted to make a quorum in authorizing the execution of the notes and mortgages which were duly executed by the president and secretary. One of the loans had been made from plaintiff, and the other from a bank which afterward assigned its interest to plaintiff. The defendant corporation made no repudiation of the transaction and did not answer, but the judgment creditor, in addition to a general denial, alleged that the defendant corporation was not duly organized, that the alleged president and secretary had no authority to bind it by the notes and mortgages, and that their acts were not authorized; but there was no averment or evidence that the obligations were not made in good faith to secure money actually loaned to the corporation and used by it in the prosecution of its enterprise. *Held*, that the validity of the obligations could not be questioned by the judgment creditor.

Marsters v. Umpqua Oil Co. 374.

VALIDITY OF MORTGAGES MADE BY OFFICERS AND DIRECTORS FOR THEIR OWN BENEFIT.

4. The officers and directors of a corporation act in a fiduciary capacity and cannot represent the company and themselves at the same time.

SAME—CASE UNDER CONSIDERATION.

5. The stock, with the exception of two shares, of a corporation, the directors of which were S, K, and J, was issued to K for a conveyance to it of K's mines. K then contracted to sell the stock to S for \$45,000, and deposited it in escrow with a bank. After S had defaulted on his contract, the directors adopted a resolution reciting that the corporation had purchased of K the mines for \$45,000, that \$35,500 thereof remained unpaid, and directing S, the president, and J, the secretary, to execute to K notes for such sum, secured by mortgage on the mines, which they did. Thereupon K released his claim on the stock deposited in escrow, and authorized the bank to deliver it. *Held*, that the resolution reciting the indebtedness of the corporation to K for the purchase price of the mines, having required the vote of either S or K, both of whom were directly and personally interested therein, was of no force, so that the mortgage, which was to secure the debt of one director to another, was

void, there being only the indirect benefit to the corporation that with shares thus released an overissue of stock, for which the corporation was liable, was taken up. *Haines Mercantile Co. v. Highland Mines Co.* 71.

AUTHORITY OF GENERAL MANAGER—RATIFICATION.

6. Where the general manager of a corporation, who is actually in control of its business, enters into a contract on behalf of such corporation that is not evidently beyond the scope of his apparent authority, and, with knowledge of the facts, the consideration is retained by the corporation and no objection made to the contract, the legal conclusion is that the act of the manager has been approved, or that he had full authority to make the contract orig'nally—and in either case the corporation is bound. *West v. Washington Railway Co.* 436.

FOREIGN CORPORATION—PROCESS—LOCAL SECRETARY AS AGENT.

7. A secretary of a local branch of a beneficiary society incorporated in another state, whose duty it is to forward to the principal office approved applications for membership, to receive, countersign and deliver certificates issued on such applications, to collect and forward assessments, to keep a list of the local members, to notify the principal secretary of suspensions, withdrawals and deaths, and to communicate information from the supreme officers to the local members, is an "agent" of such foreign beneficiary society on whom summons may be served under Section 55, B. & C. Comp., relating to service of process on foreign corporations. *Riddle v. Order of Pendo*, 229

LIABILITY OF TRANSFEE OF ASSETS.

8. Where a corporation transfers all its assets, with a view to going out of business, and nothing is left with which to pay its debts, the transferee is charged with notice of the circumstances of the transaction, and takes the assets subject to an equitable lien for the unpaid debts of the transferring company, the property of a corporation being a fund subject to be first applied to the payment of debts.

Williams v. Commercial National Bank, 492.

LIABILITY OF STOCKHOLDERS FOR DISTRIBUTIONS.

9. Where a stockholder receives the assets of a corporation upon its liquidation, leaving it without funds to pay its creditors, he can be required to refund the full amount in a suit by a creditor to follow the assets of the corporation. *Williams v. Commercial National Bank*, 492.

See, also, CREDITOR'S SUIT, 1.

CORROBORATION.

Accomplices—Nature of Verifying Evidence. See CRIM. LAW, 4.

COSTS.

APPEAL—BRIEFS—PRINTING.

1. On a motion to retax costs as to the printing of appellant's abstract and brief, the issue to be determined is not the reasonableness of the charges, but what was actually paid by appellant.

Portland Iron Works v. Willett, 245.

APPORTIONMENT IN EQUITY.

2. Costs in equity suits may be apportioned to suit the particular requirements of each case.

Pickett's Will, 127; *Grant v. Oregon Navigation Co.* 324; *West v. Washington Railway Co.* 436; *Gardner v. Wright*, 609.

SAME—UNUSUAL CASE.

3. Where, on appeal by defendants in a suit to quiet title, a decree is rendered that plaintiffs are the owners of a portion of the property which was the subject of the suit, and their title thereto is quieted, they are entitled to their costs in the trial court, though adjudged to be without interest in the remainder of the property, defendants having denied plaintiffs' right to any of the property. *Grant v. Oregon Navigation Co.* 324.

COUNTIES.

LIABILITY OF RELATIVES TO SUPPORT POOR RELATIONS.

Under Section 2654, B. & C. Comp., relating to the support of poor persons by their relatives, a county must show by its pleading, in an action to recover the cost of caring for a poor person, that the defendant relative had been ordered by the county court to support the poor person and had refused. *Multnomah County v. Felling*, 603.

COUNTY COURT.

What Officials Necessary to Constitute. See COURTS, 1.

Source of Jurisdiction of Over Local Option. See COURTS, 2.

COURTS.

COUNTY COURT—JUDGE AND COMMISSIONERS.

1. Under Const. Or. Art. VII, § 11, providing for a county judge, and Section 12, authorizing the election of two commissioners to assist the judge in county matters, the judge alone is the county court as much as though one of or both the commissioners were sitting with him.

State v. MacElrath, 294.

COUNTY COURT—NATURE OF JURISDICTION IN LOCAL OPTION MATTERS.

2. In the performance of the duty imposed upon it by the local option law, the county court acts in a special capacity under Const. Or. Art. VII, § 12, giving it jurisdiction pertaining to "such others powers and duties * * as may be prescribed by law," so that it is immaterial whether the duties imposed by the local option law be discharged by the county court when presided over by the county judge alone, or when the county commissioners are sitting with him, since in either case the action is that of the county court.

State v. MacElrath, 294.

POWER TO VACATE VOID JUDGMENT.

3. Courts of record have inherent power to set aside void judgments or other orders whenever such matters are called to their attention.

Multnomah County v. Portland Cracker Co. 345.

CREDITORS' SUIT.

CORPORATIONS—EXHAUSTION OF LEGAL REMEDIES.

1. Where creditors have reduced their claims against a corporation to judgments and have had executions returned *nulla bona*, they have exhausted their remedies at law, and may proceed in equity to follow the corporation's assets into the hands of a transferee.

Williams v. Commercial National Bank, 492.

CORPORATIONS—ACCRUAL OF RIGHT OF ACTION.

2. In a proceeding in the nature of a creditors' bill to reach the assets of a liquidated corporation placed beyond the reach of legal process in fraud of creditors, the statute of limitations does not begin to run until the return of execution *nulla bona* upon plaintiff's judgments against the corporation.

Williams v. Commercial National Bank, 492.

LIMITATION OF ACTION.

3. Where a corporation made a transfer to defendant, valid as between them and only constructively fraudulent as to creditors of the corporation, because it deprived it of means to pay its debts, the remedy of the creditors against defendant is equitable and not primary; and judgment against the corporation and execution thereon returned *nulla bona* are prerequisites to its suit against defendant, so that limitations against the suit commence to run, not from the time of the transfer, or even from the time of plaintiffs' discovery of the property, but only from the return of the execution *nulla bona*.

Williams v. Commercial National Bank, 492.

EFFECT OF EVIDENCE.

4. The evidence adduced justifies the conclusion that Wells, Fargo & Co. was the real purchaser of the stock and assets of the Commercial National Bank in 1894 and 1898.

Williams v. Commercial National Bank, 492.

CRIMINAL LAW.

CONTEMPT PROCEEDING NOT A CRIMINAL PROSECUTION.

1. A contempt proceeding is not a "criminal prosecution," within the meaning of that phrase in Const. Or. Art. I, § 12, providing that defendants shall not be obliged to testify against themselves in such cases.

State ex rel. v. Sieber, 1.

COPY OF CHARGE MUST BE DEMANDED.

2. The right to know the nature and cause of a criminal accusation, conferred by Const. Or. Art. I, § 11, must be exercised by a demand for a copy of the charge. The mere neglect to give defendant a copy is not a deprivation of the constitutional guaranty.

State ex rel. v. Sieber, 1.

REFERENCE TO COMMON LAW FOR DEFINITION.

3. Although there are no common law offenses in Oregon, the common law is still the source from which we draw the definitions of many offenses denounced by the code, and reference may properly be made thereto for that purpose.

State v. Ayers, 61.

CORROBORATING TESTIMONY OF ACCOMPLICE.

4. This case affords an example of the rule established in Oregon by Section 1406, B. & C. Comp., that a conviction cannot be had on the uncorroborated testimony of an accomplice.

State v. Kellher, 77.

EVIDENCE—STANDARDS FOR COMPARING HANDWRITING.

5. Under Section 777, B. & C. Comp., providing that evidence respecting handwriting may be given by a comparison by a skilled witness, or the jury, "with writings admitted or treated as genuine by the party against whom the evidence is offered," only writings admitted and treated as having been written by defendant personally can be used as a basis of comparison against one accused of crime.

State v. Branton, 86.

CUMULATIVE EVIDENCE OF HANDWRITING—HARMLESS ERROR.

6. In a prosecution for assault with intent to kill, a poorly spelled letter, purporting to have been written by defendant and relating to his prospective marriage, was admitted in evidence after testimony by the recipient that she discussed its contents with defendant after she had received it. No expert based his opinion as to the genuineness of another incriminating letter purporting to have been signed by defendant, on a comparison with the first letter, and the attention of the jury, who had before them numerous genuine samples of defendant's handwriting, was not particularly called to such letter. *Held*, that, even if defendant's

acknowledgment of the contents of the letter was not a sufficient admission of the genuineness of the penmanship to permit its use as a standard of comparison by an expert, yet its admission before the jury could have caused no appreciable injury to defendant. *State v. Branton*, 86.

EVIDENCE OF OTHER LIKE OFFENSES.

7. Where evidence of an accomplice as to the commission by him of other similar acts about the same time is admitted for the purpose of showing guilty knowledge and intent in the defendant, there must be other testimony connecting defendant with such acts or the evidence should be withdrawn by the court. *State v. Kelliker*, 77.

HUSBAND AND WIFE—WITNESSES.

8. Section 724, B. & C. Comp., providing that neither husband nor wife shall at any time be examined as to any communication made by one to the other does not apply to criminal proceedings, the criminal code being complete on the subject of the competency of a husband or wife to testify in a criminal prosecution against the other. *State v. Luper*, 605.

ASSAULT BEING ARMED—PRESUMPTION OF INTENT.

9. Where a person uses a deadly weapon with violence upon the person of another, and the act has a direct tendency to do some great bodily injury to the one assailed, the intent to injure him may be inferred from the act, under B. & C. Comp., §788, subd. 3, declaring that the law presumes that a person intends the ordinary consequences of his voluntary act. *State v. Bock*, 25.

PRESUMPTION AS TO QUALIFICATION OF JUROR.

10. Where a juror has been accepted without question the presumption is that he was entirely qualified; if it is desired to review the ruling of the trial court in overruling an objection to a juror, it must appear that an unqualified juror was forced on appellant. *State v. Megorden*, 259.

LEADING QUESTIONS ARE DISCRETIONARY.

11. It is discretionary with the trial judge to permit or refuse leading questions, and where he permits such questions to be asked of children 14 and 18 years of age who are called as witnesses against their father on a trial for killing their mother, he has acted wisely. *State v. Megorden*, 259.

INSTRUCTION AS TO REASONABLE DOUBT.

12. The question of reasonable doubt in a murder trial as to murder in the first degree is fully covered in an instruction that, if it should appear "beyond a reasonable doubt that the defendant had committed a crime which is included in the crime charged in the indictment, and there should still remain in your minds a reasonable doubt as to which degree he is guilty of, then, in that case, the defendant is entitled to the reasonable doubt as to the higher crime or to the highest degree, and you can only return a verdict of guilty of the degree of the crime so included in the indictment as to which there is no reasonable doubt." *State v. Megorden*, 259.

INSTRUCTION ASSUMING FACTS—PROVINCE OF JURY.

13. Where, on a trial for assault with a dangerous weapon, the evidence of the state showed that defendant committed the offense and he relied on an alibi, an instruction that it was not necessary to prove a specific intent, that the law presumed the intent "from the fact that defendant was armed with a dangerous weapon, and that he made an assault while so armed," is erroneous as assuming that defendant was armed with a weapon, which was a controverted fact. *State v. Bock*, 25.

INSTRUCTION AS TO MORAL CERTAINTY.

14. Refusal to give an instruction in a murder trial that the presumption of innocence "must be overcome by competent evidence which convinces you of his guilt to a moral certainty" is not error where an instruction is given that "moral certainty, only, is required, or that degree of proof which produces conviction in an unprejudiced mind."

State v. Megorden, 259.

INSTRUCTION NOT BASED ON FACTS.

15. An instruction which begins with a sentence inapplicable to the facts in a trial is properly refused.

State v. Megorden, 259.

CAUTIONARY INSTRUCTIONS USUALLY DISCRETIONARY.

16. Cautionary instructions in trials, where there is nothing in the circumstances of the case making them necessary, are within the discretion of the court.

State v. Megorden, 259.

INSTRUCTION AS TO PRESUMPTION OF INNOCENCE.

17. Refusal to give an instruction in a criminal trial that the presumption of innocence "follows him in the trial of this case until the contrary is shown beyond a reasonable doubt" is not error where an instruction was given that defendant "is presumed to be innocent until the contrary is proven," the two being substantially the same.

State v. Megorden, 259.

INSTRUCTION AS TO LESSER GRADES.

18. A trial judge may with propriety refuse to instruct a jury as to the lesser grades of an offense charged unless there is evidence tending to show that the lesser offense was committed.

State v. Megorden, 259.

FORMAL REQUISITES OF CRIMINAL JUDGMENT.

19. An order in a criminal case concluding, "It is therefore ordered that * * be confined in the penitentiary," etc., is a sufficient judgment. In this connection the word "considered" is frequently used, but it is not necessary.

State v. Branton, 86.

PAYMENT OF FINE PENDING APPEAL.

20. The rule that the voluntary payment of a judgment pending an appeal operates as a satisfaction of the judgment applies to both civil and criminal cases, and no appeal can be taken from a judgment imposing a fine after the amount has been deposited with the clerk, even if such deposit was made under protest and solely to prevent being put in jail after the trial judge had refused to grant a stay of execution or fix the amount of bail, there being no statute in Oregon providing for the deposit of the amount of a fine pending an appeal.

Washington v. Cleland, 12.

See HOMICIDE, JUSTICES OF THE PEACE, TRESPASS.

CROSS EXAMINATION.

Limitation to Matters of Direct Examination. See WITNESSES, 6.

CRUELTY. Examples of. See DIVORCE, 1, 2.

CURATIVE ACTS. See STATUTES, 9.

CURING DEFECTS IN PLEADING.

Example of Imperfect Complaint Aided by Verdict. See PLEADING, 15.

DAMAGES.

PERSONAL INJURIES—EVIDENCE AS TO EXISTENCE AND NUMBER OF PLAINTIFF'S FAMILY NOT HARMLESS.

1. In a personal injury case evidence that plaintiff had a family, consisting of a wife and children, is irrelevant and improper, and the error is not rendered harmless by the statement of the court, on overruling an objection to the evidence, that plaintiff could not recover anything by reason of his having a family, but that the evidence was competent, as showing the conditions which might affect his mental feelings, nothing further in the way of instructions or otherwise having been done in regard to the evidence. *Warner v. DeArmond*, 199.

SPECIFIC DECREE—DAMAGES.

2. In a suit for specific performance, the court, having acquired jurisdiction, may assess such damages as appear to have been sustained prior to the filing of the complaint as incidental to the remedy of specific performance. *West v. Washington Railway Co.* 436.

Alienation of Affections. See HUSBAND & WIFE, 1, 2.

Incidental to Equitable Relief. See SPECIFIC PERFORMANCE, 6.

DEADLY WEAPON.

Presumption of Intent From Use in Manner Calculated to Inflict Personal Injury. See CRIMINAL LAW, 9.

DECEDENTS' ESTATES. Same as EXECUTORS & ADMINISTRATORS.

DECLARATIONS by Third Persons. See EVIDENCE, 5.

DEDICATION.

STREETS—PLATTING AND SELLING AS A DEDICATION.

1. Where the proprietor of lands lays out a town thereon in the manner provided by statute, platting the same into blocks and streets, and the plat is duly executed, acknowledged and recorded, and he sells lots therein with reference thereto, he thereby dedicates the streets to the public irrevocably. *Christian v. Eugene*, 170.

SELLING AND BUYING LOTS AS ACCEPTANCE OF A STREET.

2. The selling of lots in a tract of platted land by the original lot proprietor, and the corresponding purchase by numbers of the public at large, amount to an acceptance of the streets shown on the plat without formal action by the authorities. *Christian v. Eugene*, 170.

CLAIM OF MISTAKE—ENJOINING USE OF STREETS.

3. Where land has been platted and lots sold with reference thereto, the dedicator cannot enjoin the public authorities from using the streets shown on such plat, because there was a mistake in the plat, for such an error can be rectified only by a suit for that purpose, to which all the persons interested must be made parties—no collateral attack on the plat will be permitted. *Christian v. Eugene*, 170.

DEEDS.

DELIVERY—INTENTION.

1. The delivery of a deed is a question of intention, and may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so completely as to deprive the grantor of all authority over it or of the right of recalling it. *Sappingfield v. King*, 102.

EFFECT OF TESTAMENTARY RECITALS.

2. An instrument in the form of a deed reciting that it is made upon the condition that it shall take effect from and after the death of the maker is not a deed, since it does not presently transfer absolutely the property described, and title is not thereby conveyed, if the maker recalls it, even after it has been delivered and recorded.

Sappingfield v. King, 102.

EFFECT OF DEED NOT DELIVERED BUT SEIZED.

3. Where a deed has not been delivered, a purchaser from the grantee therein cannot obtain any title, though entirely innocent, since no title whatever passes without delivery. In case of a deed obtained through fraud, yet intended to be delivered, there would still be a delivery, and thereby the title; but without a delivery no title is transferred.

Burns v. Kennedy, 588.

Assignment of Certificate of Sale of Public Land. See **FORGERY**.

Deed Intended to be a Mortgage. See **MORTGAGES**, 2.

Evidence of Deed Being a Mortgage. See **MORTGAGES**, 1.

DEFECTIVE RECORD.

Motion for Rule to Supply—Showing Required. See **APPEAL**, 5, 6.

DEFECT OF PARTIES. See **ABATEMENT & REVIVAL**, 1.

DEFINITIONS. Same as **WORDS & PHRASES**.

Common Law for Information as to Meaning. See **CRIMINAL LAW**, 3.

DEGREE OF PROOF.

Enforcement of Oral Contract. See **SPECIFIC PERFORMANCE**, 7.

Enforcement of Contract to Invent. See **SPECIFIC PERFORMANCE**, 2.

Contempt Proceeding—Required Certainty. See **CONTEMPT**, 10.

DEHORS EVIDENCE.

When Such Evidence Cannot be Considered. See **APPEAL**, 25.

DELIVERY.

What Constitutes a Delivery of a Document. See **DEEDS**, 1.

DENIALS.

Effect of General Denial Considered. See **PLEADING**, 5.

Proofs Allowed Under General Denial. See **TRIAL**, 2; **PLEADING**, 6.

Effect of Certain Form of Denial. See **PLEADING**, 9.

DEPOT GROUNDS.

Limits and Extent of Are Questions for Jury. See **RAILROADS**, 8.

DIFFERENT DEGREES OF CRIME.

Harmless to Charge Two Degrees of an Offense. See **INDICT. & INF.** 3.

DIMINUTION OF RECORD.

Suggesting Defects—What Showing is Required. See **APPEAL**, 5, 6.

DIRECTING JUDGMENT.

Remanding With Instructions as to Judgment. See **APPEAL**, 13.

DIRECTING VERDICT.

Proper to Refuse Under Conflicting Evidence. See **TRIAL**, 7.

DIRECTORS OF CORPORATIONS.

Validity of Corporate Mortgages Made to Prefer Interests of Directors—Self Interest. See **CORPORATIONS**, 2-5.

DISBARMENT.

Perjury as Ground for Cancelling License. See ATTORNEY & CLIENT, 1.

Forgery as Reason to Cancel a License. See ATTORNEY & CLIENT, 2.

DISBURSEMENTS. Same as COSTS.**DISCLAIMER.** Conduct Showing. See WATERS, 7.**DISCRETION.**

Amendment of Pleadings. See CONTEMPT, 3; APPEAL, 17.

Ordering Arrest in Contempt Cases. See CONTEMPT, 4.

Allowing Leading Questions to Children. See WITNESSES, 4.

Reviewing Order Changing Place of Trial. See VENUE.

Directing Verdict on Conflicting Evidence. See TRIAL, 7.

Allowance of Motion to Delay Trial—Good Faith. See CONTINUANCE.

Opening Judgment During Term of Entry. See JUDGMENT, 5.

Correcting False Record at Any Time. See JUDGMENT, 6.

Order of Hearing Witnesses and Proof. See TRIAL, 1.

DISPUTED FACTS.

Propriety of Directing Particular Verdict. See TRIAL, 7.

DIVORCE.**THEFT AND KEEPING STOLEN PROPERTY AS CRUELTY.**

1. The commission of theft and the keeping of the stolen property at home is ordinarily an act of personal indignity to the other spouse.

Gallagher v. Gallagher, 155.

ASSAULT BY ANOTHER AS CRUELTY.

2. The scramble of the wife for the possession of her child, which brought on an assault against the husband by her brother, is not such an act of cruelty toward the husband as to be ground for a divorce.

Gallagher v. Gallagher, 155.

EVIDENCE OF ADULTERY.

3. In a suit for divorce by the wife, evidence held insufficient to establish any immoral conduct on the part of the wife.

Gallagher v. Gallagher, 155

DOCKETS.

County Court—Statute as to Keeping Records. See JUDGMENT, 3.

DOCUMENTARY EVIDENCE.

Telegrams—Books of Account—Maps. See EVIDENCE, 9, 10, 11.

DRUNKENNESS.

Degree of Necessary to Avoid a Contract. See VEND. & PUR. 2.

DUPLICITY.

Charging Several Degrees of an Offense. See INDICT. & INF. 3.

DYING DECLARATIONS.

Circumstances Justifying Admission of in Evidence. See HOMICIDE, 1.

ELECTION OF REMEDIES.

Right to Require When Pleadings Are Confused. See PLEADING, 13.

EMERGENCY Clause in Statutes.

Construction of Emergency Clause in Const. Or. Art. IV. §1. STAT. 5, 6.

EQUITY.**JURISDICTION—REMEDY AT LAW—MONEY JUDGMENT.**

1. The rule that equity will retain control of a case and do full justice between the parties, even to a money judgment, after it has acquired juris-

diction on an equitable ground, cannot be invoked in a case where all the equitable grounds have failed—there the only questions before the court are legal and the law courts afford an adequate remedy.

Multnomah County v. Portland Cracker Co. 345.

SAME—CASE UNDER CONSIDERATION.

2. In a suit to cancel alleged fraudulent entries on public records and to recover the amount of a tax which purported to be cancelled by such entries, the decree granting all the relief asked cannot be sustained as to the judgment for the tax where it appears that all the entries are either void on their face or have already been set aside by the court having control of the records, for the statutes afford sufficient means of collecting the tax without the intervention of a court of equity.

Multnomah County v. Portland Cracker Co. 345.

JURISDICTION TO COLLECT TAXES.

3. The method prescribed by law for the collection of taxes is the one that must be exclusively followed.

Multnomah County v. Portland Cracker Co. 345.

SAME—CASE UNDER CONSIDERATION.

4. Where a statute requires the tax collector to return to the office of the county clerk a roll showing the uncollected taxes and directs that the clerk make therefrom a delinquent roll with a warrant to the tax collector to collect the sums thereon stated from the persons against whom they are assessed, the record thus provided for is exclusive, and the fact that extraneous memoranda or notations to the effect that the taxes have been remitted are allowed to be made on the record by strangers affords no reason why the clerk should not issue the delinquent warrant or the sheriff enforce it as directed, and a court of equity should not undertake to cancel such notations, for they are obviously void as they appear.

Multnomah County v. Portland Cracker Co. 345.

See, also, CREDITORS' SUITS, 1; INJUNCTION, 1; TAXATION, 1.

ESTATES OF DECEDENTS. Same as EXECUTORS & ADMINISTRATORS.

ESTOPPEL.

ESTOPPEL TO REVOKE A PAROL LICENSE GRANTED FOR A CONSIDERATION.

1. A parol license, granted for a consideration, in pursuance of which appreciable expenditures of money have been made, cannot be revoked at the caprice of the grantor. *Sumpter Railway Co. v. Gardner*, 412.

SAME—CASE UNDER CONSIDERATION.

2. Where a railroad company has extended a spur across a tract of land with at least the knowledge, if not at the request, of the owner, and thereby enabled such owner to market much valuable timber that would otherwise have been inaccessible, it will be permitted to maintain the track until the timber is also removed from an adjoining tract that all parties contemplated should be similarly logged.

Sumpter Railway Co. v. Gardner, 412.

NEED OF PLEADING ESTOPPEL.

3. In order to render an estoppel available it must be pleaded if there is an opportunity to do so. *Christian v. Eugene*, 170.

STREETS—EQUITABLE ESTOPPEL AGAINST OPENING.

4. The evidence in this case does not show such equitable considerations as to justify a court of equity in depriving the citizens of the city of the use of the street in question. *Christian v. Eugene*, 170.

ESTOPPEL—EQUITABLE NATURE.

5. The doctrine of estoppel is intended to preclude fraud, and imposes silence on one, when in conscience and honesty he should not be allowed to speak, to the accomplishment of justice. *Gardner v. Wright*, 609.

ESTOPPEL BY DEED—DENIAL OF TITLE BY GRANTOR.

6. Where one assumes to convey property by deed, he will not be heard, in order to defeat his grantee's title, to say that at the time of the conveyance he had no title, and that none passed by the deed, nor will he be permitted to deny to the deed its full effect.

Gardner v. Wright, 609.

ESTOPPEL BY DEED—PERSONS WHO MAY CLAIM BENEFIT—PAROL TRANSFEREE—WATERS.

7. E. conveyed to M. and G. possessory title to public land, including the right to the full use of a stream, and G. orally transferred his interest to M. *Held*, that no diversion of water having been made prior to G.'s parol conveyance, nor until after the diversion by E. on land above, defendant, as E.'s successor in interest, was not estopped to claim subsequent rights acquired by E. as to G.'s interest in the water rights previously conveyed.

Gardner v. Wright, 609.

EVIDENCE.**COMPETENCY OF CONTRADICTORY EVIDENCE.**

1. It is competent for a party to an action to state what he did in reference to the occurrence in question and when he did it, as presenting his version of the case in opposition to the version of the other side.

SAME—CASE UNDER CONSIDERATION.

2. In an action against a lumber company to recover for injury to a bridge by a passing vessel chartered by defendants, plaintiff charged defendants with participation in the negligent navigation of the vessel. *Held*, that testimony by defendants' manager that the officers of the company had nothing to do with the navigation of the vessel, and that his orders to the master to take his vessel to a dock beyond the bridge were not given on the day the attempt was made, was competent.

Multnomah County v. Willamette Towing Co. 204.

EVIDENCE COMPETENT TO EXPLAIN OPPONENT'S TESTIMONY.

3. In an action against the charterer of a vessel to recover for injuries to a bridge, where defendant denied responsibility for the navigation of the vessel, evidence to show how one of defendant's employees happened to be on board at the time is competent.

Multnomah County v. Willamette Towing Co. 204.

ADMISSIBILITY OF QUESTION CALLING FOR AN OPINION.

4. In replevin by one in possession of machinery attached as belonging to another, the question asked plaintiff, "could any reasonable person doing business with" the attachment defendant, "in supplying parts of machinery for the machine, know that you controlled it?" was properly excluded as calling for witness' mere opinion, and not for any pertinent facts.

Taylor v. Brown, 423.

COMPETENCY OF DECLARATIONS OF THIRD PERSONS.

5. Statements by third persons not in the presence of the party against whom they are offered are not competent evidence. *Taylor v. Brown*, 423.

PRESUMPTIONS OF CONTINUANCE OF OWNERSHIP.

6. In a suit to foreclose a note and mortgage, where the mortgagor testified that the mortgage to plaintiff had never been paid or discharged, the presumption is that plaintiff continued to be the owner thereof.

Marsters v. Umpqua Oil Co. 374.

PRESUMPTIONS—WITHHOLDING EVIDENCE.

7. Where, in an equitable proceeding, the good faith of a party to a transaction under consideration is questioned by the complaint and evidence, and such party holds back proof exclusively within its control, or fails to produce it on demand, the law puts the interpretation upon such conduct most unfavorable to such party.

Williams v. Commercial National Bank, 492.

RES GESTAE—EXPLANATORY EVIDENCE.

8. In an action to recover for injury to a bridge by a vessel passing through under its own steam, but assisted for steering purposes by a tugboat, the defense by the tugboat company being that the injury was caused by interference with the navigation of the vessel by her captain without consulting the pilot, testimony as to what the captain of the vessel said at the time or immediately after giving the order is competent as a part of the *res gestae*.

Multnomah County v. Willamette Towing Co. 204.

DOCUMENTARY EVIDENCE—TELEGRAMS.

9. In an action by a broker against a customer to recover an amount due on a sale and purchase for defendant on an exchange, telegrams sent by plaintiff to its agents at the place of the exchange, directing such sales and purchases are competent to show that an actual and *bona fide* sale and purchase was contemplated, the telegrams being the original memoranda made at the time.

Overbeck v. Roberts, 37.

SAME—BOOKS OF ACCOUNT.

10. In an action on notes of a corporation, entries in the company's book of bills payable as to the notes, which were made after the notes were executed, and by a person who did not appear as a witness, were not admissible to affect their validity if the payee had no knowledge of the entries and had not assented to them, although alluded to in testimony taken at a former trial and read by plaintiff.

Baines v. Coos Bay Navigation Co. 192.

SAME—MAPS.

11. A map made from miscellaneous sources of information, without an actual survey on the ground, is not competent evidence of the location of objects or of the distances shown thereon.

Seabrook v. Coos Bay Ice Co. 237.

COMPETENCY OF OPINION EVIDENCE—CASE UNDER CONSIDERATION.

12. In an action to recover damages from a towing company for negligently towing a vessel against a bridge instead of through its draw opening, a witness who had many times passed through that bridge on vessels under tow, had watched their navigation, and was familiar with the circumstances of the accident in question, having been on the deck of the vessel when she struck the bridge, is competent to express an opinion as to how the mishap occurred and what caused it, this being a case where a witness combines a statement of what he saw with a statement of his deduction therefrom, which is sometimes permissible.

Multnomah County v. Willamette Towing Co. 204.

OPINION WITNESS—DUTY TO DETERMINE QUALIFICATION—DISCRETION.

13. The qualification of a witness to express an opinion is a question of fact for the trial judge, whose finding will not be disturbed, except for abuse of discretion.

Multnomah County v. Willamette Towing Co. 204.

SAME—EFFECT AND SCOPE OF OBJECTION.

14. An objection to a question asked of an expert that it is "incompetent, irrelevant and immaterial, upon the ground that a proper hypothesis or foundation had not been laid for asking the question," goes only to the competency of the question. *State v. Megorden*, 259.

SAME—HYPOTHETICAL QUESTION.

15. Where an expert has examined a wound and described it to the jury, it is not necessary to propound in a hypothetical form a question as to its effect. *State v. Megorden*, 259.

SAME—THEORETICAL KNOWLEDGE—COMPETENCY.

16. A regularly graduated, licensed and practicing physician is competent to testify as to the effect of a blow on a person's head as described by other witnesses, although he had never seen or treated a case of the kind. *State v. Megorden*, 259.

WEIGHT AND SUFFICIENCY OF UNCONTESTED EVIDENCE.

17. Where a disinterested witness, who is in no way discredited by other evidence, testifies to a fact within his knowledge, which is not in itself improbable, or in conflict with other evidence, the facts so given will be taken as legally established. *Miller's Will*, 452.

EXCEPTION.

Need of Pleading Against Exceptions and Provisos. *INDICT. & INF.* 5.

EXCEPTIONS, BILL OF. Same as **BILL OF EXCEPTIONS.**

EXECUTED CONTRACTS. See **STATUTE OF FRAUDS**, 2.

EXECUTORS AND ADMINISTRATORS.**EFFECT OF SELECTION OF ATTORNEY BY DECEDENT.**

1. The appointment of an attorney to advise an executor is a matter entirely personal to such officer, and he is not bound by any provisions or suggestions in the will. *Pickett's Will*, 127.

LIMIT OF JURISDICTION OF PROBATE COURT IN PASSING ON PETITION OF EXECUTORS OR ADMINISTRATORS.

2. In passing on petitions of executors or administrators for authority to perform specified acts, probate courts have no jurisdiction to issue orders covering other matters, their jurisdiction being limited to granting or denying the prayers of the petitions. *Noon's Estate*, 286.

DESCENT OF REAL PROPERTY—APPLICATION OF STATUTE AFFECTING VESTED RIGHTS—RIGHT OF EXECUTORS TO SELL.

3. The title to real property of a decedent vests in the heirs at once upon death, without any proceeding, subject only to be sold for purposes then provided by statute, and any deprivation or impairment of such vested right by subsequent legislation is void. *Noon's Estate*, 286.

SAME—CASE UNDER CONSIDERATION.

4. A testator who had devised real property to his wife and children died while B. & C. Comp. § 1172 was in force, providing that personal property of a decedent not specially bequeathed should be primarily liable for the payment of debts, etc. During the administration of his estate an act (Laws 1905, pp. 223, 224, § 3) was passed amending the section so as to authorize a sale of the real estate of a decedent for the payment of debts before disposing of the personalty, where the interests of the parties would be subserved thereby. *Held*, that the rights of the devisees could not be impaired by the law of 1905, and, if the testator left per-

sonalty not specially bequeathed, the court could not order a sale of the realty until the proceeds of a sale of the personalty were exhausted.

Noon's Estate, 286.

EXECUTORY CONTRACT.

Example of Hop Contract Not a Sale. See **CONTRACTS**, 8.

EXHIBITS.

Need of Attaching to Record or Identifying. See **BILL OF EXCEPTIONS**.

EXPECTED ANSWER.

Need of Showing What Witness Would Have Stated Had he Been Allowed to Answer. See **APPEAL**, 11; **TRIAL**, 3.

EXPERT WITNESS.

Scope of Objection to Testimony of. See **WITNESSES**, 1.

Hypothetical Question—Personal Knowledge. See **WITNESSES**, 2.

Competency of Medical Witness Without Personal Experience in the Particular Field Under Consideration. See **WITNESSES**, 3.

EXTENDING TIME ON NOTE.

Effect Before Adoption of Negotiable Instruments Act of Granting Additional Time to Debtor. See **PRINCIPAL & SURETY**, 3.

Law After Adoption of Negotiable Instruments Act of Granting Further Time to Debtor. See **BILLS & NOTES**, 6.

FENCES.

Allegations and Proofs as to Want of Fence. See **RAILROADS**, 9.

FICTITIOUS PERSON.

Executing Written Instrument in Name of. See **FORGERY**.

FINDINGS.

Reviewing Sufficiency of Evidence to Support. See **APPEAL**, 15.

Necessity and Scope of in Law Actions. See **APPEAL**, 16.

FIRES.

Liability for Fires From Debris on Right of Way. See **RAILROADS**, 2.

Engines Throwing Sparks—Resulting Damage. See **RAILROADS**, 4, 5.

Duty of Owner to Suppress Fire From Engines. See **RAILROADS**, 6.

Evidence of Fires Not Traced to Defendant. See **RAILROADS**, 7.

FOREIGN CORPORATIONS.

Serving Process on Local Secretary—Effect of. See **CORPORATIONS**, 7.

FORGERY.

INSTRUMENT IN NAME OF FICTITIOUS PERSON AS FORGERY.

An instrument executed in the name of a fictitious person purporting to assign all the right, title and interest of the grantor in and to certain public land described in a certificate of sale theretofore issued by the State Land Board to such fictitious person is a "deed" within the meaning of Section 1858, B. & C. Comp., which provides a punishment for any person who shall falsely make, forge or counterfeited any deed.

State v. Kellher, 77.

As Reason for Disbarment. See **ATTORNEY & CLIENT**, 2.

FORMER ADJUDICATION. See **JUDGMENT**, 1, 2, 3.

FRAUDS, STATUTE OF. Same as **STATUTE OF FRAUDS**.

GAMING.**BURDEN OF PROOF AS TO NATURE OF TRANSACTION.**

1. In an action by a broker against a customer to recover an amount due plaintiff on transactions conducted by the broker for defendant on stock exchanges, the burden of proving that the transactions were a mere cover for differences is on defendant. *Overbeck v. Roberts*, 37.

KEEPING HOUSE FOR SELLING POOLS—CRIMINAL OFFENSE.

2. The keeping of a house for selling pools on horse racing is not an offense punishable under Chapter 50, Deady's Gen. Laws, relating to the playing of games by gambling devices, since the winner is not determined by the manipulation of any device. The ticket issued by the seller cannot be considered a device influencing the result. *State v. Ayers*, 61.

POOL SELLING—CONCURRENT AND EXCLUSIVE JURISDICTION OF MUNICIPAL CORPORATIONS AND THE STATE.

3. Where a municipality is given jurisdiction over a misdemeanor already punishable under a state law, the jurisdiction will be construed to be concurrent unless the contrary clearly appears to have been intended. *State v. Ayers*, 61.

SAME—CASE UNDER CONSIDERATION.

4. Section 1930, B. & C. Comp., prohibiting the selling of pools on horse races, as gambling, is not affected by Section 72 and Section 73, subd. 49, of the Charter of Portland of 1903, authorizing the prevention and punishment of gambling houses, there being no words of exclusion or restriction as to the state offense. *State v. Ayers*, 61.

GENERAL DENIAL.

Rules of Pleading Reviewed. See **PLEADING**, 5.

Proofs Generally—Negligence. See **PLEADING**, 6; **TRIAL**, 2.

GENERAL MANAGERS.

Conduct Showing Approval of Acts of. See **CORPORATIONS**, 6.

GIFTS.**GIFT CAUSA MORTIS—EFFECT OF EVIDENCE.**

It appears that defendant, when dangerously ill, deeded the property to plaintiff, who thereupon executed back the deed in question, which was delivered to a third person, who delivered it to defendant after his recovery, in view of which it must be held that the deed was a gift *causa mortis* and was clearly revoked by the acceptance of the deed vesting the title. *LeBrun v. LeBrun*, 368.

GOVERNMENT LANDS. Same as PUBLIC LANDS.**GRAND JUROR.**

Right of Court to Excuse From Service. See **INDICT. & INF.** 1.

GUARANTY.

Validity of by Agent to Principal. See **PRINCIPAL & AGENT**, 3.

HANDWRITING.

Admitted Writings Must be Standards for Comparison. **CRIM. LAW**, 5.

HARMLESS ERROR. See APPEAL & ERROR, 18-21.**HEARSAY EVIDENCE. See EVIDENCE, 5.****HOMICIDE.****ADMISSIBILITY OF DYING DECLARATIONS.**

1. Where a statement as to the circumstances of an affray was made by the injured person after being told by his physician that he could not

recover unless by a rare chance after a surgical operation, and within a few minutes the person died from the wounds received, the statement is admissible as a dying declaration made under a realization of impending death, although he agreed to submit to the operation.

State v. Thompson, 46.

EVIDENCE OF DESPERATE CHARACTER OF DECEASED.

2. On a trial for homicide defended on the ground of self defense, proof that decedent was a violent and dangerous man, is competent, whether the same was known to accused or not, to aid the jury in determining who was the aggressor in the difficulty resulting in the homicide, and the probable nature of the assault made by decedent on accused, if an assault was made; and such evidence should not be limited to the single question, who commenced the affray.

State v. Thompson, 46.

DELIBERATION—PREMEDITATION.

3. In a murder trial, there being some evidence that defendant's mind had been disturbed shortly prior to the killing, the court properly left the matter of time for deliberation and premeditation to the jury under an instruction that deliberation and premeditation must be evidenced by some proof that the design was formed and matured in cool blood.

State v. Megorden, 259.

EVIDENCE OF DELIBERATION.

4. The evidence in this case is ample on the questions of deliberation and premeditation to support the verdict of murder, and for the court to have instructed the jury that the testimony was not sufficient on those points to justify a verdict of murder in the first degree would have been a clear invasion of the province of the jury.

State v. Megorden, 259.

HOPS.

Executory Contract—Passing of Title. See **CONTRACTS, 8.**

HUSBAND AND WIFE.

DAMAGES FOR ALIENATION OF HUSBAND'S AFFECTIONS.

1. Since the enactment of Section 5250, B. & C. Comp., removing all civil disabilities on a wife that do not exist as to the husband, and granting her in her own name alone the same right to appeal to the courts for redress that her husband has, a married woman may maintain in Oregon an action for the alienation of her husband's affections.

Keen v. Keen, 362.

ALIENATION OF HUSBAND'S AFFECTIONS—EFFECT OF WIFE'S DIVORCE.

2. A wife's right to damages for alienating her husband's affections is not affected by obtaining a divorce from him after the alienation and consequent desertion.

Keen v. Keen, 362.

ALIENATING AFFECTIONS—ERRONEOUS INSTRUCTIONS.

3. In an action by a wife for the alienation of her husband's affections, the court, in overruling an objection to evidence tending to show that plaintiff's husband had sought the affections of defendant, stated that he did not think it made any difference, as his experience and observation had been that a woman "is not liable to be seduced without she contributes a little in some way to the general purposes of the case." Subsequently an instruction was given to the effect that if the jury believed that plaintiff's husband made advances toward defendant, and she merely received them passively, and gave no active encouragement, the verdict must be for defendant, and that the mere fact that a man became infatuated with a woman and fell in love with her did not furnish a

ground of action against her. *Held*, that the remark was error, under B. & C. Comp., §783, providing that an inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect, and Section 139, providing that in charging the jury the court must not present the facts of the case, but inform the jury that they are the exclusive judges of the facts.

Keen v. Keen, 363.

Privileged Communications as Evidence. See WITNESSES, 7.

INCOMPETENCY.

Objection for Does Not go to the Qualification of the Witness but Only to the Propriety of the Question. See WITNESSES, 1.

INDEMNITY SCHOOL LANDS.

Effect of Approval and Certification of List of Land by the General Government. See PUBLIC LANDS, 1.

INDICTMENT AND INFORMATION.

MOVING TO SET ASIDE INDICTMENT—STATUTES—GRAND JURY.

1. Section 1349, B. & C. Comp., prescribing the grounds on which an indictment may be set aside, is exclusive of all other reasons for such a motion, and an indictment will not be set aside because the court excused a grand juror at his own request after he had been accepted and sworn, for reasons personal to himself and not because of sickness or physical or mental inability to perform the duties required. *State v. Bock*, 25.

MOTION TO QUASH—ENDORSE NAMES OF WITNESSES.

2. Though Section 1284, B. & C. Comp., defining when a grand jury ought to find an indictment, is applicable to the filing of an information by a district attorney, and he is in duty bound to endorse on the information the name of every witness whose testimony has been considered, a failure to observe these requirements cannot be taken advantage of by a motion to quash, the penalty for omitting the names of witnesses being inability to call them on the trial. Nor will a motion to quash lie on any other grounds than those prescribed by Section 1349, B. & C. Comp.

State v. Kellher, 77.

DUPLICITY—DIFFERENT DEGREES—INTENT.

3. Since a greater offense always includes a lesser one of the same class, and as the intent with which a deadly weapon is used determines the grade of the offense committed, one may be convicted of an assault with a deadly weapon under a charge of an assault with intent to kill, the latter being an inferior grade of the former, and therefore an error in charging both crimes in one indictment is harmless. *State v. Branton*, 86.

SUFFICIENT PLEA OF AN ORDINANCE IN A MUNICIPAL COURT.

4. In a prosecution for the violation of a municipal ordinance, it is sufficient to refer in the complaint to the ordinance by title, number and date of approval, and it is not necessary to set out the ordinance in full or according to its legal effect, though the court does not pass on the question of the necessity of pleading the ordinance at all.

Nichols v. Salem, 298.

INFORMATION—PLEADING EXCEPTIONS.

5. An information under a statute containing exceptions must show that the person charged is not within such exceptions.

Binkhoff v. State, 419.

INFERENCE.

Deduction of Intent From Use of Deadly Weapon. See CRIM. LAW, 9.

INFORMATION. Same as INDICTMENT.

INHUMAN TREATMENT.

Thefts by Husband as Ground for Divorce. See DIVORCE, 1.

INITIATIVE Amendment to Constitution.

Constitution is Self Executing as to Municipalities. CONST. LAW, 4, 5.

Extent of Power Conferred on Municipalities. See CONST. LAW, 10.

Construction of Emergency Clause. See STATUTES, 5, 6.

INJUNCTION.

JURISDICTION TO ENJOIN ENFORCEMENT OF AWARD BASED ON FRAUD.

1. An award based on the fraud or perjury of the prevailing party will be set aside in equity and its enforcement permanently enjoined, a distinction being recognized between the dignity of a judgment and an award.
Fire Association v. Allesina, 316.

PRACTICE—BURDEN OF PROOF.

2. Courts will proceed cautiously in granting injunctions and should not grant them at all in doubtful cases, the burden of proof being with the plaintiff.
Pacific Telephone Co. v. Salem, 110.

SAME—CASE UNDER CONSIDERATION.

3. A city granted to plaintiff, a telephone company, the right to use the streets and alleys for 50 years, the wires to be strung on poles above ground or laid under ground, as plaintiff might elect, in consideration of which the city was to use the poles, etc., free for fire alarm purposes, and plaintiff was to furnish the fire department and city officers with telephones without charge. Thereafter, in settlement of a dispute, it was agreed between plaintiff and the city that plaintiff should pay the city \$200 annually for 10 years during which the city should not grant any franchise for a telephone system on terms more favorable than those granted plaintiff. During the term the city granted defendant a 25-year franchise; it being required that all lines and wires except house wires be placed under ground, and that defendant after the first year should pay 1 per cent on its gross annual receipts to the city, furnish and keep in repair five telephones for the use of the city, and that defendant should not, without the consent of the city, transfer the franchise or plant. *Held*, that an injunction would not issue to restrain defendant from acting under the franchise, as under the facts it was doubtful as to which franchise was the most favorable.
Pacific Telephone Co. v. Salem, 111.

INSOLVENCY.

EFFECT ON AGENCY.

The insolvency of an agent has the effect of terminating his agency, particularly upon the public announcement of his financial condition.

McLeod v. Despain, 536.

INSTRUCTIONS TO JURIES.

Charge Must be Considered as a Whole. See TRIAL, 10.

Requests Already Given Elsewhere. See TRIAL, 11.

Presumption as to Innocence of Crime. See CRIMINAL LAW, 17.

Proper Statement as to Reasonable Doubt. See CRIMINAL LAW, 12.

Duty to Instruct as to Lesser Grades. See CRIMINAL LAW, 18.

Refusing Charge Not Applicable to Facts. See TRIAL, 12.

Cautionary Instructions Are Discretionary. See TRIAL, 13.

Limiting Charge to Issues Made by the Pleadings. See TRIAL, 14.

Assuming Facts—Province of Jury. See CRIMINAL LAW, 13.

Terms of Charge as to Moral Certainty. See CRIMINAL LAW, 14.

INTENT.

Inference From Deliberate Use of Deadly Weapon. See **CRIM. LAW**, 9.

INTEREST.**INTEREST ON ACCOUNTS.**

1. Interest on an unsettled amount or from an unsettled date is not recoverable in this state. *Miles v. Bowers*, 429.

MORTGAGE FORECLOSURE—INTEREST ON TAXES PAID.

2. A mortgagee, in a suit to foreclose a mortgage, is entitled to interest on taxes paid by her on the mortgaged land during the life of the lien before foreclosure. *Wright v. Conservative Investment Co.* 177.

INTERIOR DEPARTMENT.

Conclusiveness of Final Rulings of Land Department. **PUBLIC LANDS**, 2.

INTOXICATING LIQUORS.**INTOXICATING LIQUORS—CONSTRUCTION OF LOCAL OPTION LAW AS TO ELECTIONS IN AN ENTIRE COUNTY.**

1. Section 10 of the local option law of 1905 (*Laws 1905*, pp. 41, 47), providing that a petition for an election in any county shall be effective as a petition for an election in each individual precinct in such county, and the county court shall issue an order of prohibition for each and every precinct in the county voting for prohibition, though the county as a whole votes against prohibition, means that the vote in each precinct, though cast in an election throughout the county, stands as a vote on the liquor question in that precinct without regard to the rest of the county, as well as a part of the vote on prohibition in the county at large, and is constitutional and valid. *Baxter v. State*, 353.

CRIMES—AMENDMENT OF CITY CHARTERS.

2. The local option act of 1905, where it provides for prohibiting the selling of liquor and punishing those who do sell in violation of the order of the county court, is a general criminal statute, and therefore within the exception to Section 2 of Article XI of the Constitution of Oregon, as amended in 1906. Since that amendment cities, though having the right to enact and amend their own charters, are still subject to the prohibition order of the county court, and can neither enact nor amend so as to escape the effect of such an order. *Baxter v. State*, 353.

EFFECT OF COUNTRY VOTE ON SALES IN CITIES.

3. A vote for prohibition in any subdivision of territory provided by statute controls throughout that entire district, regardless of the boundaries or regulations of smaller divisions that may be included therein; for instance, a prohibition vote in a precinct that includes an incorporated town is controlling on such town. *Baxter v. State*, 353.

INTOXICATING LIQUORS—EFFECT OF VOTE FOR PROHIBITION ON CHARTER PROVISIONS AUTHORIZING ISSUANCE OF LICENSES.

4. The effect of Section 12 of the local option law of 1905, providing that if the election goes dry no election on that subject shall be held again in that district within two years, is simply to modify the charters of cities within the district which have provisions authorizing the licensing and regulating of sales of liquor so long as the dry spell continues. It does not suspend the charters, but puts a limitation for an indefinite period on certain of their provisions. *Baxter v. State*, 353.

INTOXICATING LIQUORS—CONSTRUCTION OF LOCAL OPTION ACT WHERE PROHIBITION PREVAILS WHOLLY OR PARTIALLY.

5. Under Section 8 of the local option law (Laws 1905, c. 2, pp. 41, 45), prescribing the form of ballot for a local option election for an entire county as well as for subdivisions thereof, and Section 10, providing that where a majority of the votes in the county as a whole or in any subdivision thereof are for prohibition the court shall make an order prohibiting the sale of liquors therein, etc., if prohibition is adopted by a county as a whole, it must be applied to the entire county though a precinct therein voted against prohibition, and if prohibition is rejected by a county as a whole, still it must be applied to a precinct therein adopting prohibition. *Baxter v. State*, 353.

COUNTY COURT—NATURE OF JURISDICTION IN LOCAL OPTION MATTERS.

6. In the performance of the duty imposed upon it by the local option law, the county court acts in a special capacity under Const. Or. Art. VII, § 12, giving it jurisdiction pertaining to "such other powers and duties * * as may be prescribed by law," therefore it is immaterial whether the duties imposed by the local option law be discharged by the county court when presided over by the county judge alone, or when the county commissioners are sitting with him, since in either case the action is that of the county court. *State v. MacElrath*, 294.

MUNICIPAL CORPORATIONS—EFFECT OF LOCAL OPTION ON POWER TO REGULATE SALES OF INTOXICATING LIQUORS—IMPLIED AMENDMENT.

7. The general local option law enacted by popular vote in 1904 did not impliedly amend the existing charters of any cities, and charters remained unaffected until local option was put into force in the communities in which they were situated by county courts pursuant to the results of elections. *Renshaw v. Lane County Court*, 526.

INVADING PROVINCE OF JURY. See **TRIAL**, 8.

INVENTIONS.

Construction of Contract to Invent. See **MASTER & SERVANT**, 6.

JOINDER OF ACTIONS. See **ACTIONS**, 2.

JOINT LIABILITY.

Negligence in Undertaking Voyage—Injury by Passing Vessel—Carelessness in Navigating. See **SHIPPING**, 1, 2.

JOURNALS.

Keeping Records of County Court—Statute. See **JUDGMENT**, 3.

JUDGMENT.

RES JUDICATA.

1. A material issue litigated and necessarily decided by the judgment rendered is forever settled between the parties and those in privity with them, and cannot again be litigated. *Heitner v. Smith*, 14.

SAME—CASE UNDER CONSIDERATION.

2. Where S sued H in trover for conversion, and H denied the conversion, and alleged that he bought the chattel of S, and that it was then agreed that moneys due him from S should be applied on the purchase price, but H did not plead as a counterclaim or set-off the items of money due from S or demand any relief on account thereof, the verdict therein for S merely determined that there was no purchase, so that the question of money due H was not a material issue in the cause, and was, therefore, not determined by the judgment and the verdict does not estop H from suing for such items. *Heitner v. Smith*, 14.

COUNTY COURT RECORDS—DOCKETS AND JOURNALS—DIRECTORY STATUTE.

3. B. & C. Comp. § 921, providing that the business of the county court shall be docketed and disposed of in a certain order, and shall be entered and kept in separate books, is only directory, and an order or judgment of the court in a local option matter entered in any of its books of record is valid. *State v. MacElrath*, 294.

FORM OF DECREE ON FORECLOSURE OF SECURITY AGREEMENT.

4. In view of Section 5339, B. & C. Comp., providing that no mortgage shall be construed as implying a covenant to pay the sum secured, and, in the absence of such a covenant or other instrument to secure such payment, the remedy of the mortgagee shall be confined to the lands mentioned in the mortgage; the decree foreclosing a deed given as a mortgage should direct only a sale of the property and an application of the money received to the payment of the costs and disbursements and the debt, without any personal or deficiency judgment.

Kramer v. Wilson, 333.

DISCRETION IN VACATING FINAL ORDERS DURING TERM.

5. During the term at which a judgment or decree is rendered the judge has discretionary power to set it aside and allow the hearing of further testimony and to modify it if appropriate. *Ayers v. Lund*, 303.

POWER OF COURT TO VACATE VOID ORDER OR JUDGMENT.

6. Courts of record have ample power to correct untrue statements in their records, and to vacate void orders and judgments, whenever the matters are brought to their attention.

Multnomah County v. Portland Cracker Co. 345.

CONCLUSIVENESS OF JUDGMENT IN FORCIBLE DETAINER—QUIETING TITLE.

7. A judgment in forcible entry or detainer does not bar a suit to cancel a deed, to quiet the title or remove a cloud. *Burns v. Kennedy*, 588.

Formal Requisites of Criminal Judgment. See CRIMINAL LAW, 19.

JURY.

CONSTITUTIONALITY OF STATUTE AS TO QUALIFICATIONS OF JURORS.

1. Section 123, B. & C. Comp., providing that, on the trial of a challenge for actual bias, although it appears that the juror challenged has formed or expressed an opinion from what he has heard or read, such opinion shall not be sufficient to sustain the challenge, but the court must be satisfied that the juror cannot try the issue impartially, does not conflict with Const. Or. Art. I, § 11, giving accused the right to trial by an impartial jury. *State v. Megorden*, 259.

OPINION—ACTUAL BIAS.

2. A juror who testified that he was not acquainted with defendant: that he had read of the case and discussed it, but did not know whether the people with whom he talked knew all the facts; that he had formed an opinion which it would take considerable evidence to remove, but did not know that he had ever expressed it; that he would be willing, if he were on trial, to have one sit on the jury who was in the same frame of mind; that he could enter on the trial giving defendant the presumption of innocence; that he knew nothing about the case except what he had read or heard; that he had read about it at the time and had seen a little notice of it since; that his opinion was based on the truth of the report he had heard and if it developed on the trial that it was false he would not regard it as evidence in the case and could try the case impartially—is not disqualified. *State v. Megorden*, 259.

COMPETENCY OF TAXPAYER IN ACTION AGAINST HIS COUNTY.

3. In an action by or against a county for damages, a taxpayer thereof may be challenged by either party for implied bias.

Multnomah County v. Willamette Towing Co. 204.

STIPULATIONS—EFFECT—CHALLENGE OF JURORS.

4. An oral stipulation in open court to select the jury from the jury list, and waive right to challenge for implied bias, does not relate to future trials.

Multnomah County v. Willamette Towing Co. 204.

JUSTICES OF THE PEACE.

JUSTICES COURTS—HOW TO APPEAL IN CRIMINAL CASE.

1. Under the provisions of Sections 2240, 2292 and 2298, B. & C. Comp., regulating the giving of notices of appeal in criminal cases before justices of the peace, the only method of showing that a notice of appeal was given in such a case in open court, which may be done, is by the justice's docket, where the fact that such a notice was so given is required to be recorded.

State v. Connolly, 406.

TRIAL—WHEN ISSUES ARE ACCOMPLISHED.

2. Before a case can be said to be ready for trial under Section 118, B. & C. Comp., which defines a trial, the case must be at issue on either law or facts as to all parties, and no trial can be demanded when some parties have answered and others have moved or demurred.

Mulkey v. Day, 312.

TIME FOR PLEADING—NONSUIT.

3. A justice of the peace has no authority to grant an order of nonsuit for want of a pleading within less time than is allowed by law to file such plea, and his action in so doing is in excess of his jurisdiction.

Mulkey v. Day, 312.

LABORERS.

Construction of Charter Requirement of Residence. **MUNIC. CORP.** 5.

LAND DEPARTMENT.

Conclusiveness of Irregular Rulings of. See **PUBLIC LANDS**, 2.

LAW OF THE CASE. See **APPEAL & ERROR**, 26.

LAWS OF OREGON.

For Compiled Laws see **STATUTES OF OREGON**.

For Uncompiled Laws see **SESSION LAWS OF OREGON**.

LEADING QUESTIONS Are Discretionary. See **WITNESSES**, 4.

LEGISLATIVE POWER.

Legality of Curative Statutes. See **STATUTES**, 9.

LESSER OFFENSE.

Including With Charge of Greater is Harmless. See **INDICT. & INF.** 3.

LICENSES.

ESTOPPEL TO REVOKE A PAROL LICENSE GRANTED FOR A CONSIDERATION.

1. A parol license, granted for a consideration, in pursuance of which appreciable expenditures of money have been made, cannot be revoked at the caprice of the grantor. *Sumpter Railway Co. v. Gardner*, 413.

SAME—CASE UNDER CONSIDERATION.

2. Where a railroad company has extended a spur across a tract of land with at least the knowledge, if not at the request, of the owner, and thereby enabled such owner to market much valuable timber that

would otherwise have been inaccessible, it will be permitted to maintain the track until the timber is also removed from an adjoining tract that all parties contemplated should be similarly logged.

Sumpter Railway Co. v. Gardner, 413.

DAMAGES FOR INJURY BY TRESPASSER.

3. A licensor is not liable for damages caused the licensee by the unauthorized acts of trespassers. *Boring Lumber Co. v. Roots*, 569.

LIENS.

Miners' Liens—Sufficiency of Record. See *MINES*, 2.

Logs—Duration of Lien—Destruction of Subject Matter. See *LOGS*, 2.

LIMITATION OF ACTIONS.

EFFECT OF ADMISSIONS ON PLEA OF LIMITATIONS.

1. Though a failure to deny the allegations of a complaint is an admission thereof, such admission does not preclude the plea of the statute of limitations. *Gilman v. Cochran*, 474.

TRIAL—INSTRUCTION AS TO LIMITATIONS—BURDEN OF PROOF.

2. An instruction, in an action on a note, that the note in suit was barred by limitations, and furnished no evidence of liability against defendant, unless there had been a payment made thereon by defendant within six years before action brought, and that the burden of proof to establish the payment was on plaintiff, is not objectionable as ambiguous or misleading, and is a correct statement of the law.

Gilman v. Cochran, 474.

PART PAYMENT—SUFFICIENCY.

3. Under B. & C. Comp. § 25, providing that, if any payment shall be made on an indebtedness after the same shall have become due, the statute of limitations shall run from the time of payment, such payment must have been intended by the debtor as a payment upon the particular debt, in order to toll the statute, and the application of such payment by the creditor in the absence of direction therefor by the debtor is insufficient.

Gilman v. Cochran, 474.

NOTES—EFFECT OF PART PAYMENT.

4. A payment on a joint obligation by one of the obligors or his agent or legal representative revives it against all who were liable thereon, though made without even their knowledge. *Scott v. Christenson*, 223.

NOTES—INDORSEMENT OF PART PAYMENT.

5. An indorsement on a note, purporting to acknowledge receipt of money, is admissible in evidence in favor of the party making it, to repel the presumption of the bar of limitations, on his testifying that one of the joint makers paid the money to him to be credited on the note.

Scott v. Christenson, 223.

See *ADVERSE POSSESSION*, 5, 6; *CORPORATIONS*, 2, 3.

LOCAL LAWS.

Meaning of Local as Applied to Cities. See *CONST. LAW*, 7.

Municipal Control of Local Legislation. See *CONST. LAW*, 6.

Local Municipal Legislation Defined. See *CONST. LAW*, 7.

LOCAL OPTION.

Effect of Election in an Entire County. See *INTOX. LIQUORS*, 1.

Escaping Prohibition by Amending Charter. See *INTOX. LIQUORS*, 2.

Effect of County Vote on Selling in Cities. See *INTOX. LIQUORS*, 3.

Effect of Prohibition Vote on Provision of Municipal Charters Authorizing Licenses to be Issued. See *INTOX. LIQUORS*, 4, 7.

Effect Where Prohibition Carries in County. See INTOX. LIQUORS, 5.
 Effect Where Prohibition Partially Carries in County. INTOX. LIQ. 5.
 Source of Jurisdiction Over Local Option Matters. INTOX. LIQUORS, 6.

LOGS AND LOGGING.

EVIDENCE OF CONSENT TO SALE.

1. In this action, under B. & C. Comp. § 5692, for damages for rendering difficult, uncertain or impossible of identification logs subject to laborers' liens, the evidence is insufficient to support a finding that the logs were sold and delivered with the knowledge and consent of all the lienholders.
Fischer v. Cone Lumber Co. 277.

DURATION AND CONTINUITY OF LIEN.

2. Under a statute conferring a right to a lien for labor or materials, and requiring a notice of the intention to claim the lien, as, Sections 5677 and 5683, B. & C. Comp., relating to loggers' liens, and the statutes giving liens to laborers on buildings and in mines, the lien attaches at once upon the completion of the work and by law continues for a specified time, but beyond that period it can be continued only by filing the prescribed notice—unless the notice is filed the lien expires.

Fischer v. Cone Lumber Co. 277.

LIEN—EFFECT OF DESTRUCTION OF LOGS.

3. The sawing into lumber of logs subject to a lien in favor of the persons who labored in preparing them for market does not affect the lien, since the subject-matter is not destroyed, but is only changed.

Fischer v. Cone Lumber Co. 277.

EFFECT OF ASSIGNING LOGGER'S LIEN ON RIGHT TO DAMAGES FOR RENDERING IDENTIFICATION DIFFICULT.

4. An assignment of a laborer's lien on logs carries with it the right to the remedy given by B. & C. Comp. § 5692, providing that any person who shall injure or render difficult or impossible of identification logs upon which there is a lien, without the consent of the person entitled thereto, shall be liable to the lienholder for the damages to the amount of the lien, although the alleged injury was committed before the assignment, since such remedy is for an injury to the lien, and not for an injury to the right in the property.

Fischer v. Cone Lumber Co. 277.

APPEAL—DEFECTIVE STATEMENT OF CAUSE OF ACTION.

5. Where, in an action for damages for injury to the laborer's lien on saw logs, the complaint does not contain any distinct formal allegation that the lien notice was filed as required by statute, but set out a copy of the lien notice, which stated when the labor was performed and when rendition of services was closed, and that "thirty days have not elapsed since that time," the statement amounts to a defective statement of the facts recited, and, in the absence of a demurrer, is sufficient to sustain the complaint against an objection made for the first time on appeal.

Fischer v. Cone Lumber Co. 277.

LOGGING—CONTRACT FOR SALE OF STANDING TIMBER.

6. A contract for the sale of standing timber, indefinite by its terms as to how the timber shall be moved or at what place on the tract, becomes definite by the subsequent acts of the grantee, and the locations so established are as binding as if fixed by the parties originally.

Boring Lumber Co. v. Roots, 569.

SAME—DAMAGES FOR INTERFERENCE.

7. Where a right, as, for example, to cut and remove standing timber, has become vested at a particular point by the action of the parties,

neither the grantor nor any one acting under him can interfere without incurring a liability for damages—and it is not a defense to show that the right of removal might have been exercised equally as well at other points.

Boring Lumber Co. v. Roots, 569.

RAILROAD—CONTRACT FOR RIGHT OF WAY—RIGHT OF ENTRY.

8. A contract agreeing to convey a right of way within a time specified, with the right to enter on the property described, does not confer an immediate right of entry.

Boring Lumber Co. v. Roots, 569.

PLEADINGS AND PROOFS IN LAW ACTIONS.

9. A party must prove the allegations or claims on which he relies, and if rights are conditional, he must prove a compliance with the condition.

Boring Lumber Co. v. Roots, 569.

SAME—CASE UNDER CONSIDERATION.

10. A buyer of standing timber under a contract limiting the time for its removal, who relies on an extension of the time for the removal of the same, pursuant to a subsequent contract granting the extension of time on a specified condition, must establish performance of the condition before he can rely on the subsequent contract.

Boring Lumber Co. v. Roots, 569.

SAME—CASE UNDER CONSIDERATION.

11. Parties litigant should not forget the rule of pleading that proofs must correspond to and be limited by the claims stated in the written pleadings, and rights beyond those thus asserted cannot be granted in law actions.

Boring Lumber Co. v. Roots, 569.

SAME—CASE UNDER CONSIDERATION.

12. Where a buyer of standing timber under a contract limiting the time for its removal alleges in his complaint, in an action for the seller's breach of contract, that he was allowed the time specified in the contract for the removal of the timber, without pleading any modification of the contract, he cannot rely on a subsequent contract extending the time for the removal.

Boring Lumber Co. v. Roots, 569.

LICENSE—DAMAGES FOR INJURY BY TRESPASSER.

13. A licensor is not liable for damages caused the licensee by the unauthorized acts of trespassers.

Boring Lumber Co. v. Roots, 569.

SAME—CASE UNDER CONSIDERATION.

14. An owner sold standing timber on his premises, and gave the buyer the right to remove the same within one year. Before the expiration of the year, he agreed to convey to a railroad company a right of way. The contract did not give the company the right to enter on the premises, but the company, before the expiration of the year, did enter on the premises and interfered with the buyer's method of removing the timber. *Held*, that the buyer could not, for the damages sustained, maintain an action against the owner, but his remedy was against the company.

Boring Lumber Co. v. Roots, 569.

LOST WILL.

Establishment of Terms of—Burden of Proof. See **WILLS**, 7.

Presumption of Revocation From Possession by Maker. See **WILLS**, 8.

Presumption of Revocation From Possession by Stranger. **WILLS**, 9.

Execution of Raises Strong Presumption of Existence. See **WILLS**, 10.

Competency of Declarations of Testatrix Concerning Her Will and Her Feeling Toward the Devisees. See **WILLS**, 11.

MANAGING AGENT.

Implied Authority From Conduct—Ratification. See **CORPORATIONS**, 6.

MAPS.

Conditions Rendering Them Competent. See **EVIDENCE**, 11.

MASTER AND SERVANT.**CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

1. A nonsuit on the ground of contributory negligence in an action for injury to an employee in a sawmill while replacing a belt on a moving pulley by the catching of his clothing on bolts projecting from the sides of the pulley so far as to be liable to catch one's clothing, is properly refused where there was evidence that pulleys were usually constructed so that the bolts did not thus project, that it was customary and proper in this class of sawmills to replace belts on revolving pulleys of such character, that there was no particular danger in doing so if the pulley were properly constructed, that the employee had no knowledge of the defect, and that in putting on the belt he was discharging the duties usually required and expected of an employee in his situation.

Warner v. DeArmond, 199.

LIABILITY FOR USING INFERIOR MACHINERY.

2. In an action for injuries to an employee in a mill, caused by the catching of his clothing on bolts projecting from a revolving pulley, it is competent to show that such pulleys are commonly used in mills of that class, an employer using machinery in common use not being liable for an accident which might have been prevented by the use of different machinery, in the absence of a statute providing the kind and character of machinery to be used or regulating the use thereof.

Warner v. DeArmond, 199.

CONTRACT OF EMPLOYMENT TO INVENT.

3. Where, in a contract of general employment of inventing skill, there is an express agreement that the employer is to be the owner of any invention made by the employee, the employer becomes the owner of the employee's inventions.

Portland Iron Works v. Willett, 245.

SPECIFIC PERFORMANCE—CONTRACT TO INVENT—DEGREE OF PROOF.

4. To warrant a decree for the specific performance of a contract stipulating that the inventions of an employee made during his employment shall become the property of the employer, the contract must be clearly proven and its terms as to subject-matter, consideration and other essentials must be specific.

Portland Iron Works v. Willett, 245.

EVIDENCE OF EMPLOYMENT TO INVENT.

5. On the issue of the existence of a contract of employment by letters, it appeared that the employee offered his services to the employer, who replied that he desired a man in the capacity mentioned, and inquired whether the employee was a machine draughtsman. The employee replied by submitting blue prints of drawings of machinery previously designed by him, and stated that all of the machines designed were in successful operation, and that he desired \$1,800 per year to start with. The employer replied that he accepted the employee's proposal with the understanding that drawings, patterns or designs of machinery made by the employee should belong to the employer, to which the employee replied that he would regard the drawings and patterns, etc., as belonging to the employer as a part of the consideration for the salary. Held, sufficient to establish a contract of employment.

Portland Iron Works v. Willett, 245.

SAME—CONSTRUCTION OF CONTRACT TO INVENT.

6. An employee accepted the employee's offer to work for him with a proviso that the employer should be the owner of drawings, patterns and designs of machinery made by the employee during his employment. The employee replied that any improvements which he might make the employer was welcome to have, and he would assign patents therefor to the employer upon payment of the expense; but that these matters could be arranged in a personal interview. *Held*, that the employee did not reserve for future negotiation, the question of the ownership of any improvements which he might make in machinery, especially where he, without any further negotiation, went to work and suggested to the employer that a design was patentable, but that the remark about the interview related to the details of procuring and assigning the patents.

Portland Iron Works v. Willett, 245.

SAME—MEANING OF TERM "DESIGN."

7. An employee tendered his services to a sawmill manufacturer, and stated that he had designed machines which were in successful operation. The employer accepted the proposal of the employee with the understanding that drawings, patterns or "designs" of machinery made by the employee should be the property of the employer. *Held*, that the word "designs" was intended by both parties to cover the invention of any new machine or improvement thereof, and was not used in the sense of ornamental design.

Portland Iron Works v. Willett, 245.

SAME—TIME OF CONTINUANCE OF CONTRACT.

8. A contract of employment stipulating a specified monthly compensation for the time the employee shall remain, and providing that the contract may be terminated by either party on notice, is for an indefinite time and cannot be construed as an employment for a year.

Portland Iron Works v. Willett, 245.

SAME—OWNERSHIP OF INVENTIONS BY EMPLOYEE.

9. Under a contract of employment stipulating that drawings, patterns or designs of machinery made by the employee during the time of his service shall belong to the employer, all inventions worked out during the continuance of the contract, and the patents therefor, belong to the employer.

Portland Iron Works v. Willett, 245.

SPECIFIC PERFORMANCE—CONDITION PRECEDENT.

10. Where a contract of employment stipulated that inventions made by the employee should be the property of the employer, and the employee made inventions, and incurred expenses in making applications and procuring patents, the employer must, in order to compel the employee to surrender title to the patents, pay the expenses incurred.

Portland Iron Works v. Willett, 245.

MEANDER LINES.

Presumed to Mean Actual High Water Mark. See **BOUNDARIES**, 4.

MEDICAL EXPERTS.

Regularly Licensed and Practicing Physician. See **EVIDENCE**, 16.

MENTAL CAPACITY.

Testator—Evidence of Understanding. See **WILLS**, 1.

Drunken Vendor—Evidence. See **VENDOR & PURCHASER**, 1.

MINES AND MINERALS.

MINERS' LIENS—RECORDING OF LEASE IN MINING RECORDS.

1. Any book kept by the proper officer as part of the records of his office, in which are recorded instruments affecting mines, is a book of "mining records" under Section 5668, B. & C. Comp., providing that miners' liens shall not attach to the interest of the owner if the work was done for a lessee whose lease was recorded in the "mining records" of the county before the work began. *Slover v. Bailey*, 426.

RECORDING INSTRUMENTS IN DESIGNATED BOOKS.

2. If no particular book is designated in which an instrument must be recorded, it will be sufficient to record it in any book kept by the recording officer for that purpose. *Slover v. Bailey*, 426.

MISCONDUCT of Trial Judge.

Invading Province of Jury by Remarks. See **TRIAL**, 8.

MISTAKE. See **REFORMATION OF INSTRUMENTS.**

MORAL CERTAINTY. Instruction. See **CRIMINAL LAW**, 14.

MORAL TURPITUDE.

Forgery and Perjury as Grounds for Disbarment. See **ATTY. & CLIENT.**

MORTGAGES.

DEED AS A MORTGAGE—EFFECT OF EVIDENCE.

1. A review of the evidence leads to the conclusion that the deed under consideration was in fact a mortgage to secure advances made by the grantee. *Kramer v. Wilson*, 333.

EFFECT OF MORTGAGE DEED—PAROL EVIDENCE.

2. A deed intended as a security will be treated as though it were a mortgage and its true nature may be shown by parol evidence.

Kramer v. Wilson, 333.

FORM OF DECREE ON FORECLOSURE OF SECURITY AGREEMENT.

3. In view of Section 5339, B. & C. Comp., providing that no mortgage shall be construed as implying a covenant to pay the sum secured, and, in the absence of such a covenant or other instrument to secure such payment, the remedy of the mortgagee shall be confined to the lands mentioned in the mortgage; the decree foreclosing a deed given as a mortgage should direct only a sale of the property and an application of the money received to the payment of the costs and disbursements and the debt, without any personal or deficiency judgment.

Kramer v. Wilson, 333.

FACTS SHOWING A MORTGAGEE IN POSSESSION—DUTY OF MORTGAGOR TO PAY MORTGAGE BEFORE RECOVERING POSSESSION.

4. Plaintiff mortgaged the property in controversy for its full value, and soon after moved from the state without paying any portion of the mortgage debt. She thereafter returned and occupied the premises with the mortgagee's consent for a short time, when she borrowed more money from the mortgagee and directed him to take possession in payment of the mortgage and the money so borrowed, which he did, thereafter paying taxes on the property, repairing fences, etc., and subsequently conveying to defendant. Held, that the mortgagee and defendant were mortgagees in possession, and that plaintiff, the mortgagor, was therefore not entitled to recover the property without paying the mortgage.

Lambert v. Howard, 342.

RIGHTS OF MORTGAGEE IN POSSESSION.

5. Although under Section 336, B. & C. Comp., a mortgagee cannot obtain possession of the mortgaged land by any legal proceeding except a foreclosure and sale, yet, once he has possession peaceably, he may retain it against the mortgagor until the mortgage debt has been paid.

Lambert v. Howard, 342

FORECLOSURE—REQUIRING STATEMENT OF CLAIM OF INTEREST.

6. An allegation in a complaint for the foreclosure of a mortgage that defendants each have or claim some interest or right in or to the mortgaged premises, but that plaintiff's mortgage lien is prior in date and superior in equity thereto, is sufficient to require a disclosure of their claim by the defendants on penalty of being forever barred.

Wright v. Conservative Investment Co. 177.

FORECLOSURE—RIGHT OF INFERIOR LIEN CLAIMANT TO BE DISMISSED.

7. A defendant who has admitted in a foreclosure suit that she claims an interest in the mortgaged property is not entitled to be dismissed; but, on the contrary, plaintiff is entitled to an adjudication on the rank of such claim.

Wright v. Conservative Investment Co. 177.

FORECLOSURE—ALLOWING ATTORNEY'S FEES.

8. The amount to be allowed as an attorney's fee on a note is a question of fact, and either the judge or jury, as the case may be, is bound by the testimony and cannot arbitrarily disregard undisputed evidence.

Wright v. Conservative Investment Co. 177.

SAME—CASE UNDER CONSIDERATION.

9. Plaintiff, in an action to foreclose a mortgage, having supported the allegation of the complaint, that \$50 was a reasonable attorney's fee for the foreclosure, by testimony of an attorney of experience, and there being no evidence to the contrary, the court may not disregard such testimony and allow a smaller sum, the determination of the issue not being in the discretion of the court.

Wright v. Conservative Investment Co. 177.

FORECLOSURE—INTEREST ON TAXES PAID.

10. A mortgagee, in a suit to foreclose a mortgage, is entitled to interest on taxes paid by her on the mortgaged land during the life of the lien before foreclosure.

Wright v. Conservative Investment Co. 177.

REDEMPTION—EFFECT.

11. A senior mortgagee in a suit to foreclose his mortgage joined a junior mortgagee as a defendant, and the decree in terms foreclosed all title and estate of the defendants. The property was sold under the decree, and the junior mortgagee purchased, and the senior mortgagee, having succeeded to the interest of the mortgagor, redeemed from the sale. Held, that the redemption by the first mortgagee abrogated the sale of the premises, and restored to him, as the successor in interest of the mortgagor, the estate in the land as if the first mortgage had not been given, and the land was subject to the lien of the second mortgage.

Jacobson v. Lassas, 470.

Validity of Mortgage to Directors. See **CORPORATIONS**, 4, 5.

MOTION.

Proper Move Against Confused Pleading. See **PLEADING**, 13.

For Rule to Supply Defective Record. See **APPEAL**, 5.

Application to Make More Definite. See **PLEADING**, 12.

Quashing for Want of Names of Witnesses. See **INDICT. & INF.** 2.

MUNICIPAL CHARTERS. Same as **CHARTERS OF CITIES**.

MUNICIPAL CORPORATIONS.

LIMITS OF POWER OF CITY—CREATION OF OFFICE.

1. A municipal charter is a grant of power and the municipality has only those powers expressly or incidentally conferred, and therefore cannot create an office not provided for by the granting instrument.

MacDonald v. Lane, 530

MUNICIPALITIES—RIGHT OF COUNCIL TO CREATE AND FILL POSITION OF JANITOR OF MUNICIPAL COURT—CIVIL SERVICE.

2. The position of janitor, bailiff and assistant clerk of the municipal court created by ordinance is not an office, and its incumbent is not an officer, within the meaning of Section 306 of the Portland charter of 1903, but is a place in the subordinate administrative service of the city, and its incumbent must attain it through the regulations of the civil service.

MacDonald v. Lane, 530.

POWER OF MAYOR TO APPOINT EMPLOYEES.

3. Under Section 155, Portland charter of 1903, providing that the mayor shall appoint all officers of the city whose election or appointment is not expressly provided for by law or in the charter, he cannot appoint mere employees, as their positions are under the civil service, nor any officers except those whose appointment shall not be otherwise provided for when the appointment shall be made.

MacDonald v. Lane, 530.

RIGHT TO SALARY FROM CITY.

4. Under Sections 309, 314 and 319, Portland charter of 1903, one claiming a salary from the city must show either that he was appointed under the civil service rules or that the place he is occupying has not been classified under the civil service rules, and he is occupying it temporarily by appointment, or that he was appointed under an emergency.

MacDonald v. Lane, 530.

CHARTER REQUIREMENT OF RESIDENCE FOR LABORERS

5. Section 163 of the Portland charter of 1903, providing that "no unskilled laborer not a citizen of the United States * * and who has not resided within the city for one year * * shall be employed by the city" does not apply to citizens of this country and as to them there is no residence requirement.

Landswick v. Lane, 408.

GOVERNMENTAL POWERS—CONTROL OVER VAGRANCY.

6. Under a provision of a city charter investing the common council with the exclusive power to define what shall constitute vagrancy, and to provide for the support, punishment and employment of vagrants and paupers, the common council has power, not only to declare what shall constitute vagrancy, but also to provide for the punishment of persons guilty thereof, the power to punish being coextensive with the power to define.

Nichols v. Salem, 298.

EVIDENCE OF EXISTENCE OF CITY ORDINANCE.

7. The certificate of the city recorder, attached to his return to a writ of review in a criminal case tried before him, that he had not annexed a copy of a certain ordinance because he could not find the original thereof in his office, is not sufficient to overcome the presumption that such ordinance was in existence when the case was tried in the recorder's court.

Nichols v. Salem, 298.

SUFFICIENT PLEA OF AN ORDINANCE.

8. In a prosecution for the violation of a municipal ordinance, it is sufficient to refer in the complaint to the ordinance by title, number and

date of approval, and it is not necessary to set out the ordinance in full or according to its legal effect, though the court does not pass on the question of the necessity of pleading the ordinance at all.

Nichols v. Salem, 238.

CONSTITUTION—CREATION AND AMENDMENT OF MUNICIPAL CHARTERS.

9. Const. Or. Art. XI, § 2, as amended in 1906, prohibits the legislature from enacting, amending, or repealing any municipal charters, and grants to the legal voters of every city and town the power to enact and amend their charter, but does not grant the right of repeal.

Acme Dairy Co. v. Astoria, 520.

MUNICIPAL CORPORATIONS—INCORPORATION ACT—ALTERATION—POWERS OF TAXATION—CREDIT.

10. Laws 1903, p. 337, § 23, amending the act incorporating Salem, provides that the common council shall not create any debt or liability, provided that at the end of each year an estimate shall be made of the actual revenues to be derived from all sources, and from the total of that estimate the total of fixed charges shall be deducted, and the disbursements of the city council shall be restricted to the balance; that no debt shall be contracted in excess of the estimated revenues, except in case of an emergency, etc., and that the indebtedness of the city shall not exceed \$20,000, except as provided by Section 6, which authorizes the contracting of indebtedness for the purpose of obtaining control of public utilities. *Held*, that such act is not in violation of Const. Or. Art. XI, § 5, providing that acts for the incorporation of cities and towns shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit, for evidently there is a restriction provided here that seemed sufficient to the legislature.

Murphy v. Salem, 54.

EFFECT OF LOCAL OPTION ON POWER TO REGULATE SALES OF INTOXICATING LIQUORS—IMPLIED AMENDMENT.

11. The general local option law enacted by popular vote in 1904 did not impliedly amend the existing charters of any cities, and charters remained unaffected until local option was put into force in the communities in which they were situated by county courts pursuant to the results of elections.

Renshaw v. Lane County Court, 526.

EXTENT OF INITIATIVE POWER CONFERRED ON MUNICIPAL CORPORATIONS.

12. The authority to provide the manner of exercising the initiative power as to municipal legislation, reserved to the legal voters of municipalities by the amendment of 1906, Section 1a, to Const. Or. Art. IV, extends to the manner of amending the charters of cities as well as their ordinances.

Acme Dairy Co. v. Astoria, 520.

EFFECT OF ADVERSE POSSESSION OF STREETS.

13. By the express provision of Section 4820, B. & C. Comp., as well as by the weight of reason and authority, adverse possession of dedicated streets or alleys does not run against municipal authorities, though, by reason of particular circumstances, equitable estoppels are sometimes enforced against municipalities as to particular parcels of ground.

Christian v. Eugene, 170.

STREETS—EQUITABLE ESTOPPEL AGAINST OPENING.

14. The evidence in this case does not show such equitable considerations as to justify a court of equity in depriving the citizens of the city of the use of the street in question.

Christian v. Eugene, 170.

"MUNICIPALITY" AND "DISTRICT" DEFINED.

15. The term "municipality," used in Const. Or. Art. IV, § 1a, which reserves the initiative and referendum powers to the legal voters of "municipalities and districts," means district created from a designated part of the state, organized to promote local and special conveniences of the public, and is the same as "district." *Acme Dairy Co. v. Astoria*, 520.

MUTUAL MISTAKE. See REFORMATION OF INSTRUMENTS.

MUTUAL WILLS.

Degree of Evidence Required to Establish. See WILLS, 6, 7.

NAVIGABLE WATERS.

WHARF RIGHT OF UPLAND OWNERS.

1. Under B. & C. Comp. § 4042, providing that the owner of any land lying on navigable water within the corporate limits of a city is authorized to construct a wharf on the same and extend it to navigable water, the upland owner is given a preference right or license to occupy land under water for wharfage purposes, the exercise of which becomes a vested right. *Grant v. Oregon Navigation Co.* 324.

RIGHT OF UPLAND OWNER TO WHARF OUT TO CHANNEL—INCIDENTAL RIGHTS ACQUIRED BY PURCHASE OF UPLAND.

2. An upland owner was by the acts of 1872 and 1874 given the preference to purchase the tide land in front of his holdings, and if he exercised that privilege he thereby became entitled to the exclusive wharf rights to deep water, provided such right had not already become vested in another under prior acts, and as incidental to this wharf right he became entitled to all accretions to such tide land and to change the surface, so long as he does not interfere with navigation or commerce.

Grant v. Oregon Navigation Co. 324.

EFFECT OF CONVEYANCE OF SUBMERGED LAND—INTENT OF GRANTOR.

3. Although usually a deed to land having a water frontage carries the rights incident to such position, yet a deed of submerged land will be given effect as to riparian rights according to the intention of the grantor, and a description by metes and bounds or according to a plat strongly indicates a restrictive rather than an extensive intention.

Grant v. Oregon Navigation Co. 324.

SAME—CASE UNDER CONSIDERATION.

4. Where a grantor conveyed by metes and bounds a portion of a lot below low tide, which was a part of a town plat containing other blocks between that and deep water, it sufficiently appears that such grantor intended that no riparian right should pass to the grantee, who was not, therefore, entitled to deep water frontage.

Grant v. Oregon Navigation Co. 324.

NEGLIGENCE.

PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

1. It appearing that it was customary for the contractor's servants, when being carried in the performance of their duty, to ride on flat cars, etc., and that plaintiff had no knowledge of the rule in question, he was not guilty of contributory negligence.

Gray v. Columbia Central Railroad Co. 19.

CONTRIBUTORY NEGLIGENCE OF SERVANT—WHEN IMPUTABLE TO MASTER.

2. An employee, engaged with reference to the care or management of any property threatened with destruction by fire set by sparks from a

locomotive, must make reasonable effort to avert the injury, and the neglect of the employee is the neglect of the owner precluding a recovery.
Hawley v. Sumpter Railway Co. 509.

NEGOTIABLE INSTRUMENTS. Same as **BILLS & NOTES.**

NEW TRIAL.

DUTY OF COURT AS TO GRANTING.

It is the duty of the trial judge to grant a new trial when he believes the evidence insufficient in either law or fact to support the verdict.

Multnomah County v. Willamette Towing Co. 204.

Granting is Discretionary Subject to Review on Appeal After Another Trial. See **APPEAL & ERROR**, 28-30.

NONSUIT.

Question of Merits is Not Involved. See **TRIAL**, 4, 5.

Proper Manner to Dispose of Law Action. See **ACTION**, 1.

NOTES. Same as **BILLS & NOTES.**

NOTICE.

TRUSTEE—CIRCUMSTANCES AS NOTICE.

1. A person who learns of unusual circumstances connected with a transaction in which he is about to become interested, or of such facts as would put a person of ordinary prudence upon inquiry, as, that a note is payable to the payee, "trustee," or that a title is held by a person "trustee," is bound thereby to a knowledge of what could have been discovered by investigation. *McLeod v. Despain*, 536.

EFFECT OF WORD "TRUSTEE" IN WRITING.

2. The appearance of the word "trustee," in connection with the name of a party to a written instrument, is sufficient to put persons dealing with such trustee upon inquiry, and, in the absence of inquiry, they will be presumed to have known what they might have discovered.

McLeod v. Despain, 536.

SAME—CASE UNDER CONSIDERATION.

3. A landowner being heavily indebted at a high rate of interest, solicited a broker to procure the money on more advantageous terms, which he did by interesting several friends in varying amounts. The debtor then executed to the broker, "trustee" notes for the respective friends, and the notes were indorsed and guaranteed by the broker, "trustee." The original note and mortgage were assigned to the broker, "trustee." It being considered as the security for the series of notes made for the new lenders. *Held*, that the friends were put upon inquiry as to the conditions of the transaction, and were bound to know all that they might have discovered about the payments of the borrower and what was being done with the money, since the appearance of the word "trustee" implied that the broker was not acting for himself.

McLeod v. Despain, 536.

See, also, **PRINCIPAL & AGENT**, 1.

NOVATION.

NOVATION—NECESSITY OF MUTUAL AGREEMENT.

1. A valid novation cannot be accomplished without an agreement of the parties to extinguish the old debt and substitute for it a new debt against another party, which is not accomplished by the mere assumption of the existing debt by a third party. *Miles v. Bowers*, 429.

SAME—CASE UNDER CONSIDERATION.

2. The proprietors of a business sold it and the property used therein to a corporation, which, in consideration thereof, agreed to pay a claim against them for goods sold to them and used in the business. Thereafter the sellers of such goods, for a valuable consideration, executed and delivered to the former proprietors a writing reciting that the sellers agreed "to transfer the account" to the corporation. *Held*, that the facts did not show a novation releasing the proprietors from the claim of the sellers.

Miles v. Bowers, 429.

CONTRACTS FOR BENEFIT OF THIRD PERSONS—ASSUMING DEBTS.

3. Where a third party receives property in consideration of which he agrees to pay certain debts of his grantor, the owners of such debts at once obtain an additional right, that of suing the grantee; but such an agreement does not release the grantor.

Miles v. Bowers, 429.

NUISANCE.

DEGREE OF DEPRAVITY EVIDENCED BY POOL SELLING.

1. The selling for gain of pools upon horses which are to compete in public speed contests on a track is an act which "grossly" disturbs the public peace and welfare, and "openly" outrages public decency, within the meaning of those terms as used in Section 1930, B. & C. Comp.

State v. Ayers, 61.

POOL SELLING ON PRIVATE RACE TRACK AS A PUBLIC NUISANCE.

2. The sale of pools at the race course of a private corporation, but where the general public assembles, constitutes nevertheless a public nuisance, and is subject to the punishment imposed by Section 1930, B. & C. Comp.

State v. Ayers, 61.

NUNC PRO TUNC.

Entering Imaginary Orders Not Taken. See **APPEAL**, 2.

OBJECTION NOT MADE IN TRIAL COURT. See **APPEAL**, 8, 9, 10.

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Right of City Council to Create Generally. See **MUNIC. CORP.** 1.

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 Series v. Series, 35 Or. 289, cited, 213.
 Settlemire v. Newsome, 10 Or. 446, applied, 473.

- Sheak v. Wilbur, 48 Or. 376, followed, 225.
Silver v. Lee, 38 Or. 508, approved, 594.
Simmons v. Oregon Railroad Co. 41 Or. 151, cited, 21, 585.
Simmons v. Winters, 21 Or. 35, applied, 160.
Simon v. Northup, 27 Or. 487, applied, 59.
Sing On v. Brown, 44 Or. 11, followed, 195.
Smith v. Farra, 21 Or. 395, followed, 195.
Smith's Estate, 43 Or. 595, followed, 225.
Smyth v. Neal, 31 Or. 105, applied, 160.
Spencer v. Peterson, 41 Or. 257, approved, 173.
Sprague v. Jessup, 48 Or. 211, followed, 447, 448.
Stager v. Troy Laundry Co. 41 Or. 141, applied, 195.
Stanley v. Smith, 15 Or. 505, approved, 24, 306, 308.
Starr v. Stark, 7 Or. 500, followed, 590.
State v. Ah Lee, 8 Or. 214, followed, 273.
State v. Anderson, 10 Or. 448, followed, 269.
State v. Armstrong, 43 Or. 207, followed, 219, 266.
State v. Armstrong, 45 Or. 25, approved, 598.
State v. Bartmess, 33 Or. 110, followed, 269.
State v. Bowker, 26 Or. 309, cited, 31.
State v. Carver, 22 Or. 602, followed, 273, 276.
State v. Clements, 15 Or. 237, applied, 215, 421.
State v. Eggleston, 45 Or. 346, followed, 269.
State v. Fletcher, 24 Or. 295, applied, 48.
State v. Gaunt, 13 Or. 115, cited, 66.
State v. Gibson, 43 Or. 184, cited, 30.
State v. Godfrey, 17 Or. 300, cited, 68.
State v. Gray, 43 Or. 446, applied, 48.
State v. Gray, 46 Or. 24, followed, 269.
State v. Haines, 35 Or. 379, approved, 70.
State v. Hansen, 25 Or. 391, followed, 269.
State v. Hatcher, 29 Or. 309, cited, 31.
State v. Humphreys, 43 Or. 44, followed, 219.
State v. Justus, 11 Or. 178, distinguished, 81.
State v. Kelly, 41 Or. 20, approved, 89.
State v. Lavery, 35 Or. 402, approved, 89.
State v. Lee, 33 Or. 506, cited, 88.
State v. Linn County, 25 Or. 503, applied, 59.
State v. Mackey, 12 Or. 154, cited, 31.
State v. Magers, 35 Or. 520, followed, 271.
State v. Martin, 47 Or. 282, followed, 267, 269.
State v. McDaniel, 39 Or. 161, followed, 269.
State v. McGrath, 35 Or. 108, followed, 607.
State v. McLennen, 16 Or. 59, approved, 89.
State v. Miller, 46 Or. 485, distinguished, 266.
State v. Morey, 25 Or. 241, followed, 273, 275.
State v. Nease, 46 Or. 433, cited, 66, 68.
State v. O'Day, 41 Or. 495, approved, 291.
State v. O'Donnell, 36 Or. 222, cited, 84, 86.
State v. Ogden, 39 Or. 195, followed, 269.
State v. Phenline, 16 Or. 107, applied, 58.
State v. Robinson, 32 Or. 43, applied, 58, 59.
State v. Savage, 36 Or. 191, distinguished, 24, 197.
State v. Shaw, 22 Or. 287, applied, 59.
State v. Simons, 39 Or. 111, followed, 267.

- State v. Smith, 47 Or. 485, followed, 269.
 State v. Tamler, 19 Or. 528, followed, 421.
 State v. Tarter, 26 Or. 38, followed, 49, 269.
 State v. Vowels, 4 Or. 324, cited, 66.
 State v. Warren, 41 Or. 348, cited, 80.
 State v. Wheeler, 20 Or. 192, approved, 82.
 State v. White, 48 Or. 416, followed, 265, 267.
 State v. Whitney, 7 Or. 386, applied, 28, 81.
 State v. Witt, 33 Or. 594, cited, 27.
 State ex rel. v. Conn, 37 Or. 596, approved, 4.
 State ex rel. v. Downing, 40 Or. 309, approved, 9, 10.
 State ex rel. v. Lavery, 31 Or. 77, approved, 6, 9.
 State ex rel. v. Malheur County Court, 46 Or. 519, cited, 295, 297.
 State ex rel. v. McKinnon, 8 Or. 487, overruled, 4.
 State ex rel. v. Rhodes, 48 Or. 133, cited, 295.
 State ex rel. v. Richardson, 48 Or. 309, cited, 295, 297.
 Steel v. Portland, 23 Or. 176, approved, 173.
 Stemmer v. Scottish Ins. Co. 33 Or. 65, applied, 352.
 Stephens v. Allen, 11 Or. 188, approved, 341.
 Strode v. Washer, 17 Or. 50, approved, 307.
 Sutherland v. Roberts, 4 Or. 378, followed, 225.
 Swank v. Swank, 37 Or. 439, applied, 106.
 Swegle v. Belle, 20 Or. 323, approved, 341.
 Swegle v. Wells, 7 Or. 222, approved, 565, 566.

 Taggart v. Risley, 4 Or. 235, approved, 624.
 Tallmadge v. Hooper, 37 Or. 503, approved, 579.
 Taylor v. Welch, 6 Or. 198, applied, 112.
 The Victorian, 24 Or. 121, cited, 418.
 Thompson v. Hawley, 16 Or. 251, applied, 195, 450.
 Tongue v. Gaston, 10 Or. 328, approved, 112.
 Tyler v. Cate, 29 Or. 515, cited, 592.

 Union Power Co. v. Lichty, 42 Or. 563, cited, 599.

 Veasey v. Humphreys, 27 Or. 515, cited, 96.
 Victorian, The, 24 Or. 121, cited, 418.

 Waite v. Willis, 42 Or. 288, applied, 138.
 Walker v. Goldsmith, 7 Or. 161, approved, 393.
 Walker v. Harold, 44 Or. 205, applied, 249.
 Wallace v. Baisley, 22 Or. 572, followed, 426.
 Wallace v. Scoggins, 18 Or. 502, followed, 448.
 Washburn v. Interstate Invest. Co. 26 Or. 436, followed, 389, 390, 434.
 Wells v. Neff, 14 Or. 66, followed, 195.
 West v. Eley, 39 Or. 461, applied, 249.
 White v. Ladd, 41 Or. 324, approved, 351.
 White v. White, 34 Or. 141, applied, 106.
 Will of Ames, 40 Or. 495, approved, 139, 150.
 Will of Holman, 42 Or. 345, approved, 140, 153.
 Will of Miller, 49 Or. 452, followed, 582.
 Williams v. Wilson, 42 Or. 299, applied, 473.
 Willis v. Wilson, 3 Or. 308, approved, 546, 565.
 Willmot v. Oregon Railroad Co. 48 Or. 494, followed, 101.
 Wilson v. McEwan, 7 Or. 87, approved, 624.
 Windle v. Hughes, 40 Or. 1, followed, 391, 433.
 Wood v. Rayburn, 18 Or. 3, followed, 386.
 Wyatt v. Wyatt, 31 Or. 581, cited, 502.

Young v. State, 36 Or. 417, cited, 466.

Zorn v. Livesley, 44 Or. 501, cited, 281.

OREGON CONSTITUTION. Same as CONSTITUTION OF OREGON.

OREGON STATUTES. Same as STATUTES OF OREGON.

OTHER OFFENSES.

Evidence of Accomplice—Corroboration. See CRIMINAL LAW, 7.

PARDON.

CONSTITUTION—SCOPE OF PARDONING POWER.

1. Under Const. Or. Art. V, § 14, providing that the governor shall have power to grant reprieves, commutations and pardons, after conviction, etc., subject to such regulations as may be provided by law, and Section 1572, B. & C. Comp., providing that reprieves, commutations and pardons may be granted by the governor upon such conditions and with such restrictions as he may think proper, the governor has authority to attach to a pardon any condition that is legal, moral or possible of performance, to be performed either before or after the pardon shall take effect, as, that the person so favored shall remain a law-abiding citizen.

Ex parte Houghton, 232.

PARDON—HOW BREACH OF CONDITION MAY BE DETERMINED.

2. Where a pardon provides by its terms that a stated official shall determine whether the conditions on which it was issued have been broken, the proviso becomes binding upon the acceptance of the favor, and the person pardoned is not entitled to a judicial determination of the claim of condition broken.

Ex parte Houghton, 232.

PAROL EVIDENCE.

Showing Deed to be Really a Security. See MORTGAGES, 1, 2.

Limiting Meaning of Unambiguous Grant. See WATERS, 1.

PAROL LICENSE.

Revocation of After Expenditures Have Been Made. LICENSES, 1, 2.

PARTICULAR JUDGMENT.

Reversing Judgment With Particular Directions. See APPEAL, 13.

PARTIES.

TRIAL—RIGHTS OF ABSENT PARTIES.

Questions affecting the rights of persons not parties to a suit should not be tried until such persons have been brought in.

Wright v. Conservative Investment Co. 177.

Effect of Want of Parties. See ABATEMENT & REVIVAL.

PART PAYMENT.

Effect of by One of Several Obligors. See LIMITATION OF ACTIONS, 4.

Necessity of Specific Intent. See LIMITATION OF ACTIONS, 3.

PART PERFORMANCE.

Example of Conduct Avoiding Statute of Frauds. STAT. OF FRAUDS, 2.

PASSENGERS.

Who May be Classed as Such on Work Trains. See CARRIERS, 1.

Evidence of Custom to Carry Persons on Trains. See CARRIERS, 5.

Risk of Persons Riding on Log Trains. See CARRIERS, 7.

PAUPERS.

LIABILITY OF RELATIVES FOR SUPPORT.

1. Under Section 2654, B. & C. Comp., relating to the duty of relatives to support paupers, and the right of the county court to enforce such action, it must be alleged, in an action by a county to recover the cost of supporting the pauper, that the defendant relative has been ordered by the county court to provide the required support and has refused.

Multnomah County v. Faling, 603.

COMMON LAW LIABILITY TO SUPPORT POOR RELATION.

2. There is no common law liability resting on a citizen to support his poor relations, such obligation is purely statutory.

Multnomah County v. Faling, 603.

PAYMENT.

One paying his obligation into the hands of an agent of the payee who has in his possession the evidence of the debt, need not follow the payment to know that it reaches the creditor; but what may be the rule where the payment is made after the obligation has been sold and is not produced when the payment is tendered is not decided.

McLeod v. Despain, 536.

PERJURY.

Cause for Disbarment. See ATTORNEY & CLIENT, 1.

PERSONAL INJURIES.

See CARRIERS, 1-7; DAMAGES, 1, 2; MASTER & SERVANT, 1, 2.

PHRASES. Same as WORDS & PHRASES.

PLAT.

Effect of Recording—Claim of Mistake—Selling Lots. DEDICATION, 1, 2.

PLEADING.

AMENDMENT DURING TRIAL—DISCRETION OF COURT.

1. In replevin against attaching officers, it is not error to deny their application made during trial to amend their answer by pleading the attachment proceedings, such application being addressed to the sound discretion of the trial court, and its ruling not being reviewable except for abuse of such discretion.

Taylor v. Brown, 423.

AMENDMENT—DISCRETION OF COURT.

2. A motion for an amendment of the complaint during trial is addressed to the discretion of the trial court, which is not subject to review, in the absence of a manifest abuse. *Longfellow v. Huffman*, 486.

VARIANCE BETWEEN PLEADINGS AND PROOFS.

3. An allegation that a railroad track was not fenced at a certain point, is not supported by proof that a gate was negligently left open in a fence theretofore constructed at that point.

High v. Southern Pacific Co. 98.

PLEADINGS AND PROOFS.

4. Parties litigant should not forget the rule of pleading that proofs must correspond to and be limited by the claims stated in the written pleadings, and rights beyond those thus asserted cannot be granted in law actions.

Boring Lumber Co. v. Roots, 569.

FORM OF GENERAL DENIAL.

5. The rules of pleading under statutes permitting general denials are reviewed and discussed.

Seffert v. Northern Pacific Railway Co. 95.

RULE AS TO PROOF UNDER GENERAL DENIALS.

6. Any fact which in effect admits the cause of action, but attempts to avoid its force and effect, must be affirmatively pleaded; evidence, however, which controverts facts necessary to be proved by plaintiff may be shown under a general denial.

Multnomah County v. Willamette Towing Co. 204.

SUFFICIENCY OF DEFENSES.

7. Where several complete defenses are pleaded, the defendant is entitled to a verdict if he shall establish any one of them at the trial

Gilman v. Cochran, 474.

EFFECT OF ADMISSIONS ON PLEA OF LIMITATIONS.

8. Though a failure to deny the allegations of a complaint is an admission thereof, such admission does not preclude the plea of the statute of limitations.

Gilman v. Cochran, 474.

SUFFICIENCY OF REPLY—WAIVER OF DEFECT.

9. A denial in a reply of "each and every allegation of said answer except such facts as are set forth in the complaint admitted by said answer," is equivalent to a denial of every allegation in the answer except as alleged in the complaint, and, if it is defective, it is not entirely bad, and objection thereto is waived by going to trial without question.

Seffert v. Northern Pacific Railway Co. 95.

CONTEMPT—OFFICE OF AFFIDAVIT.

10. In contempt proceedings the affidavit by which the matter is brought to the attention of the court is really a complaint and is governed by the rules of pleading.

State ex rel. v. Sieber, 1.

PLEADING SEIZURE UNDER WRIT OF ATTACHMENT.

11. An officer who attempts to justify the seizure of property found in the possession of a stranger to his writ must both plead and show facts necessary to support the writ, which was not done in this case, and the record of the attachment was properly excluded.

Taylor v. Brown, 423.

PURPOSE OF MAKING MORE DEFINITE.

12. B. & C. Comp. § 86, authorizing the court to require a pleading so indefinite that the precise nature of the charge or defense is not apparent to be amended, only applies to a pleading containing a defective or vague statement of a good cause of action or defense, and to defects on the face of the pleading, and not to matters omitted which the opposite party desires inserted in order to demur to them.

Multnomah County v. Willamette Towing Co. 204.

REMEDY FOR COMMINGLED CAUSES OF ACTION.

13. Where several causes of action are confused in a complaint the proper practice is to move for an order requiring them to be separately stated, or that an election be made between them, and not to move to strike out parts of the pleading.

High v. Southern Pacific Co. 98.

RELEVANCY OF TESTIMONY.

14. In an action to recover money paid on a contract where plaintiff alleges that defendant agreed to repay the money received in case of non-performance on his part, and this allegation is denied in the answer, evidence that after the contract was executed defendant promised to repay the money is admissible.

Morse v. Odell, 118.

AIDED BY VERDICT.

15. The imperfect allegation or recital in a complaint that two dollars was paid January 2, 1899, in the allegation that nothing had been paid on

the note sued on, "except * * the sum of \$2 paid on account thereof, Jan. 2, 1899," is cured by a general verdict for plaintiff, the issues joined requiring proof thereof. *Scott v. Christenson*, 223.

PLEADINGS AND PROOFS. See CONTEMPT, 2; PLEADING, 3, 4.

POOL SELLING.

An Act Grossly Disturbing Peace and Decency. See NUISANCE, 1.

Concurrent and Exclusive Jurisdiction Over by Municipal Corporations and the State. See GAMING, 4.

POOR RELATIONS.

Liability of for Support is Statutory Only. See PAUPERS, 1, 2.

PORTLAND.

Charter of 1903. See CHARTERS OF CITIES.

POSTPONEMENT OF TRIAL. Same as CONTINUANCE.

PREPONDERANCE OF PROOF. See SPECIFIC PERFORMANCE, 2, 7, 10.

PRESCRIPTION. See ADVERSE POSSESSION.

PRESUMPTION

Of Continued Ownership of Property. See EVIDENCE, 6.

Of Revocation of Lost Will. See WILLS, 7, 8, 9, 10.

That Rulings of Trial Court Were Correct. See APPEAL, 22-24.

Of Intent From Assault Being Armed. See CRIMINAL LAW, 9.

As to Qualification of Accepted Juror. See CRIMINAL LAW, 10.

As to Innocence of Crime Charged. See CRIMINAL LAW, 17.

Of Nature of Evidence Withheld. See EVIDENCE, 7.

PRINCIPAL AND AGENT.

EFFECT OF NOTICE TO AGENT.

1. Notice to an agent as to matters over which he has authority is notice to the principal, but in this case there was no evidence whatever tending to show that the agent had any authority at all over the subject referred to in the notice. *Wollenberg v. Sykes*, 163.

RIGHT OF RATIFICATION.

2. The principal must adopt or reject the unauthorized acts of his agent as an entirety. *McLeod v. Despain*, 536.

LIMITATION OF RIGHT OF RATIFICATION.

3. The right of a principal to ratify unauthorized acts of his agent is subject to the limitation that he must ratify the act entirely or disaffirm it—he cannot accept the benefits and repudiate the obligations. *McLeod v. Despain*, 536.

SAME—CASE UNDER CONSIDERATION.

4. Where an agent held possession of the security for a series of notes owned by different persons, and received for them both interest and partial payments, they cannot recognize his authority for the purpose of such collections as they received and deny it as to other payments which he retained and converted. *McLeod v. Despain*, 536.

DUTY TO TRACE APPLICATION OF PAYMENT.

5. One who pays his obligation to an agent of the payee having the evidence of the debt in his possession is not under obligation to see that the payment reaches the creditor, though that may not be the case where the payment is made to the payee after he has sold and delivered the obligation and does not produce it when payment is tendered. *McLeod v. Despain*, 536.

TERMINATION OF AGENCY BY INSOLVENCY.

6. An agency may be presumed to continue until it is shown to have been terminated, but it will cease without any definite act of the principal upon the general knowledge of his insolvency.

McLeod v. Despain, 536.

SAME—CASE UNDER CONSIDERATION.

7. Defendants, who had had a debt of \$28,000, evidenced by a note secured by mortgages, applied to W. to furnish money to pay the indebtedness and take an assignment of the note and mortgages. W. secured the money from plaintiff and others, and assigned to them notes made by the defendant and payable to him as trustee and secured by the original note and mortgages. He held the original notes and security and all the other notes except those of plaintiff and S. He received payments sufficient to pay all the notes, but did not credit them on the notes of plaintiff and S., or pay the money to them. He continued under the trust without his right being questioned until he became insolvent. *Held*, that W. was the agent of plaintiff and S., with full authority to collect the sums represented by the notes, and so collected the money which was paid to him in trust for their benefit with their full knowledge and assent, and that, sufficient having been paid to him in that capacity to cancel the principal and interest of all the notes given, they, together with the mortgages, should be canceled.

McLeod v. Despain, 536.

VALIDITY OF GUARANTEE BY AGENT TO PRINCIPAL.

8. An agent may lawfully guarantee to his principal the payment of obligations that he has taken in the course of his agency proceedings.

McLeod v. Despain, 536.

BOOKS OF AGENT AS EVIDENCE.

9. The books of account kept by a trustee are admissible against his principal to show admissions against interest, as, the amounts of money received for the benefit of his principal, and also to show disbursements made within the scope of his authority.

McLeod v. Despain, 536.

ILLUSTRATION OF IMPROPER DISBURSEMENT.

10. An agent having authority to collect a large note accepted a farm for a stated amount and entered it as cash in his agency account, after which he loaned it without authority to the debtors. *Held*, that the debtors are entitled to credit for the amount paid, the question of its disbursement being entirely between the agent and his principal.

McLeod v. Despain, 536.

AGENCY—QUESTIONS FOR COURT AND JURY RESPECTIVELY.

11. The fact of agency is always for the jury, but what may be done by the agent is a question of law for the court.

Wollenberg v. Sykes, 168.

SAME—CASE UNDER CONSIDERATION.

12. In an action against the surety on an undertaking by a building contractor for performance of the contract, *held*, that whether the person assuming to act as plaintiff's architect was his agent, and, as such, authorized to act for him was a question for the jury; but whether it was within the scope of his authority, as such agent, to procure a surety for the contractor, was a question for the court.

Wollenberg v. Sykes, 168.

PRINCIPAL AND SURETY.

EFFECT OF NOTICE TO AGENT OF SURETYSHIP.

1. Notice of the facts constituting suretyship reaching one who is an agent of the principal as to this transaction is notice to the principal.

Hoffman v. Habighorst, 379.

SAME—CASE UNDER CONSIDERATION.

2. Where several parties sign a note as makers, but under an understanding with the officers of a company in which they are all interested, that the note is really to be used as collateral to secure a loan to such company, this being known to the agent through whom the money was borrowed and paid to the company, such parties are sureties as to the principal who loaned the money, she being bound by the knowledge of her agent, though the note was really made directly to her and the real beneficiary never executed any instrument to which the note in question could be collateral.
Hoffman v. Habighorst, 379.

DISCHARGE OF SURETY BY EXTENDING TIME FOR PAYMENT.

3. Where a payee of a note grants an extension of time for payment thereof to a principal debtor, without the consent of its sureties, the sureties are discharged from liability, not only to the payee, but to those who take by assignment from him after maturity.
Hoffman v. Habighorst, 379.

DISCHARGE BY ACT OF CREDITOR—KNOWLEDGE OF SURETYSHIP.

4. To render the conduct of a creditor available as a discharge of the sureties of a debtor, it must appear that when the acts relied upon occurred the creditor knew of the suretyship. It is not necessary that the creditor had this knowledge when the debt was incurred, it will be sufficient if he had acquired it before the occurrence complained of.
Hoffman v. Habighorst, 379.

BOND—ESTOPPEL ON SURETY TO DENY SIGNATURE.

5. Where a surety signed a bond and delivered it to the principal on condition that another surety be secured, and the bond, regular in appearance, was delivered to the obligee without mention of the condition, the surety is estopped to deny the validity of his act, the obligee having disadvantageously changed his position in consequence of receiving the bond.
Wollenberg v. Sykes, 163.

Effect of Signing Note as "Surety." See **BILLS & NOTES**, 1.

PRINTING.

Only Actual Cost of Abstracts and Briefs is Collectible. See **COSTS**, 1.

PRIVATE WRITINGS.

As to Books, Maps and Telegrams. See **EVIDENCE**, 9, 10, 11.

PRIVILEGED COMMUNICATIONS.

Conversations Between Husband and Wife. See **WITNESSES**, 7.

PROCESS.

Foreign Corporation—Local Secretary as Agent. **CORPORATIONS**, 7...

PROMISSORY NOTES. Same as **BILLS & NOTES.**

PROOF.

Degree of Required in Oral Contracts. See **SPEC. PERF.** 3.

Degree of Required as to Contract to Invent. See **SPEC. PERF.** 2, 7, 10.

PROVINCE OF JURY.

Instruction Construed as Assuming the Facts. See **TRIAL**, 8.

PUBLIC LANDS.

SELECTION OF INDEMNITY SCHOOL LANDS—CONTRACT.

1. When the selection by a state of indemnity school lands has been approved and certified, the title thereto vests in the state if the general government is the owner of the premises, and the approval exhausts the bases offered in exchange.
Morse v. Odell, 118.

CONCLUSIVENESS OF RULING OF LAND DEPARTMENT.

2. Although ordinarily the doctrine of *res judicata* applies to the final decisions of the Land Department of the United States, it will not apply where the proceedings are irregular, and in such cases the Commissioner of the General Land Office may review a decision of a predecessor.

Morse v. Odell, 118.

COLLATERAL ATTACK ON DEED TO PUBLIC LAND.

3. A deed from the state for tide land is not void because the line of high tide was further out than the land conveyed, so that it did not reach the water at all, but is only voidable for such defect, and not subject to collateral attack.

Grant v. Oregon Navigation Co. 324.

QUANTUM OF PROOF in Civil Cases. See SPEC. PERF. 2, 7, 10.

QUASHING.

Grounds of Motion. See INDICTMENT & INFORMATION, 2.

QUESTION FOR JURY.

What May be Done Under an Agency. See PRINCIPAL & AGENT, 11, 12.

QUESTION NOT RAISED AT TRIAL. See APPEAL, 8, 9, 10.

QUIETING TITLE.

REMOVING CLOUD—POSSESSION OF DEFENDANT—REMEDY AT LAW.

1. A suit to remove a cloud or to quiet title cannot be brought under Section 516, B. & C. Comp., against one in possession of the property, since then an adequate remedy exists at law by an action of ejectment.

Hendershott v. Sagvold, 592.

CONCLUSIVENESS OF JUDGMENT.

2. A judgment in forcible entry or detainer does not bar a suit to cancel a deed, to quiet the title or remove a cloud.

Burns v. Kennedy, 588.

FACTS SHOWING DEED NOT TO HAVE BEEN DELIVERED.

3. Defendant K and wife, having conveyed property to plaintiff, represented that there was a mistake in the deed, whereupon the wife insisted that plaintiff reconvey to her, she agreeing to execute to plaintiff another deed to the property. Plaintiff consented, and proceeded to have the two deeds drawn correcting the mistake. He and his wife executed their deed, but before K's wife would sign hers she asked to take plaintiff's out and read it to her husband, who was then in the building or at the door. Instead of doing so she took it away and had it recorded, and at once conveyed the property to defendant H. Held, that a complaint in a suit to quiet title, charging such facts, affirmatively shows that there was no delivery of plaintiff's deed intended to pass title, consequently no title was obtained by the last grantee or any subsequent purchaser.

Burns v. Kennedy, 588.

RAILROADS.

LIABILITY OF FOR FIRES RESULTING FROM DEFECTIVE APPLIANCES OR NEGLIGENT OPERATION OF ROAD.

1. To charge a railroad company for injury resulting from a fire caused by sparks from a locomotive that was either improperly constructed or negligently operated, the charge must be proved as laid.

Hawley v. Sumpter Railway Co. 509.

FIRE FROM DEBRIS ON RIGHT OF WAY.

2. Where a claim against a railroad company is made for damages resulting from a fire originating in combustible material accumulated on the right of way, it is only necessary to show that the fire started as claimed and the company will be liable, though it was supplied with

the best of locomotives and the most approved appliances for preventing the emission of sparks, and though the same were operated by the most skilled engineers. *Hawley v. Sumpter Railway Co.* 509.

FIRE—EVIDENCE OF NEGLIGENCE.

3. The evidence of plaintiff makes at least a *prima facie* case of negligence on the part of the defendant railroad company in allowing combustible material to accumulate on its right of way.

Hawley v. Sumpter Railway Co. 509.

SAME—CASE UNDER CONSIDERATION.

4. The evidence of plaintiff justifies an inference that the fire in question started from sparks dropped by one of defendant's locomotives into combustible material negligently allowed to accumulate on defendant's right of way, and escaped therefrom to plaintiff's property, destroying it.

Hawley v. Sumpter Railway Co. 509.

EVIDENCE OF FIRES FROM OTHER ENGINES.

5. In actions for damages resulting from fires caused by passing engines, it may be shown that other fires were caused by locomotives of defendant at various times in the same vicinity.

Hawley v. Sumpter Railway Co. 509.

FIRES BY ENGINES—CONTRIBUTORY NEGLIGENCE.

6. One who is in a position to prevent any danger from fire set by sparks from a locomotive without incurring unusual danger, and who makes no effort to do so, is guilty of negligence precluding a recovery.

Hawley v. Sumpter Railway Co. 509.

EVIDENCE OF FIRES NOT CONNECTED WITH DEFENDANT.

7. In an action against a railway company for a fire set by sparks from a locomotive, it is error to permit a witness to testify that he had seen fires along the company's right of way, unless the testimony connects the fires with the operation of the road by the company.

Hawley v. Sumpter Railway Co. 509.

LIMITS OF DEPOT GROUNDS—QUESTION FOR JURY.

8. Where the evidence is conflicting as to the extent of the space reasonably required for depot grounds at a given station, the question whether a particular point is within the depot grounds should be submitted to the jury.

Hugh v. Southern Pacific Co. 98.

FENCING—VARIANCE BETWEEN PLEADINGS AND PROOFS.

9. An allegation that a railroad track was not fenced at a certain point, is not supported by proof that a gate was negligently left open in a fence heretofore constructed at that point.

Hugh v. Southern Pacific Co. 98.

CONTRACT FOR RIGHT OF WAY—RIGHT OF ENTRY.

10. A contract agreeing to convey a right of way within a time specified, with the right to enter on the property described, does not confer an immediate right of entry.

Boring Lumber Co. v. Roots, 569.

RATIFICATION.

Facts Suggesting Approval of Acts of General Manager. See CORP. 6.
Approval Must be Entire or Not at All. PRINCIPAL & AGENT, 2, 3, 4.

REASONABLE DOUBT. Instruction. See CRIMINAL LAW, 12.

RECORDS.

RECORDING INSTRUMENTS IN DESIGNATED BOOKS.

1. If no particular book is designated in which an instrument must be recorded, it will be sufficient to record it in any book kept by the recording officer for that purpose. *Slover v. Bailey*, 426.

COUNTY COURT RECORDS—DOCKETS AND JOURNALS—DIRECTORY STATUTE.

2. Section §21, B. & C. Comp., providing that the business of the county court shall be docketed and disposed of in a certain order, and shall be entered and kept in separate books, is only directory, and an order or judgment of the court entered in any of its books of record is valid. *State v. MacElrath*, 294.

REDEMPTION.

Mortgage—Foreclosure—Junior Lien Holders. See MORTGAGES, 11.

REFORMATION OF INSTRUMENTS.

MUTUAL MISTAKE—BURDEN OF PROOF.

1. Written instruments will not be reformed for mistake unless such mistake is clearly shown to have been mutual, and on that point the plaintiff has the burden of proof. In the present instance the evidence does not clearly show that there was a mistake. *Bower v. Bower*, 182.

DRUNKENNESS AS GROUND FOR RELIEF.

2. A party must have been entirely without understanding of his actions to justify a court in reforming or avoiding his contract because of drunkenness. *Fagan v. Wiley*, 480.

RELATION, Title by. See WATERS, 15.

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Liability of Relations to Support. See PAUPERS.

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Where No Equitable Jurisdiction Exists. See EQUITY, 1, 2.

Where Equity May Intervene. See CREDITORS' SUITS, 1.

REMOVING CLOUD From Title. Same as QUIETING TITLE.

REPLEVIN.

RIGHTS UNDER ACTUAL POSSESSION.

1. Actual possession of property is sufficient to sustain a replevin action against one who has seized it wrongfully, without regard to any paper title. *Taylor v. Brown*, 423.

PLEADING SEIZURE UNDER WRIT OF ATTACHMENT.

2. An officer who attempts to justify the seizure of property found in the possession of a stranger to his writ must both plead and show facts necessary to support the writ, which was not done in this case, and the record of the attachment was properly excluded. *Taylor v. Brown*, 423.

AFFIDAVIT FOR WRIT AS EVIDENCE—AIDING ANSWER.

3. The affidavit filed by a plaintiff in replevin, stating the alleged cause of the detention of the property by defendant, is not a pleading, and therefore cannot aid a defective answer. *Taylor v. Brown*, 423.

PLEADING—AMENDMENT—DISCRETION OF COURT.

4. In replevin against attaching officers, it is not error to deny their application made during trial to amend their answer by pleading the attachment proceedings, such application being addressed to the sound discretion of the trial court, and its ruling not being reviewable except for abuse of such discretion. *Taylor v. Brown*, 423.

ADMISSIBILITY OF QUESTION CALLING FOR AN OPINION.

5. In replevin by one in possession of machinery attached as belonging to another, the question asked plaintiff, "Could any reasonable person doing business with" the attachment defendant, "in supplying parts of machinery for the machine, know that you controlled it?" was properly excluded as calling for witness' mere opinion, and not for any pertinent facts. *Taylor v. Brown*, 423.

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Effect—Remedies of Injured Party. See **CONTRACTS**, 2.

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RULES OF COURT.

SUFFICIENCY OF ABSTRACT.

An abstract of the record is sufficient if it shows enough of the proceedings to enable the court to pass upon the questions presented, which was the case here. *Keen v. Keen*, 362.

EXPENSE OF PRINTING.

On a motion to retax costs of the printing of appellant's abstract and brief, the issue to be determined is not the reasonableness of the charges, but what was actually paid by appellant.

Portland Iron Works v. Willett, 245.

SALES.

CONCURRENT ACTS.

1. An agreement by a debtor to sell to his creditor specified chattels at a fixed price for each, the total to be applied on the vendor's note, and by the creditor to accept the specified chattels at the price stated and credit the price on such note, is one requiring the performance of concurrent acts, and neither can claim default against the other without himself being ready, able and willing to perform his part. *Longfellow v. Huffman*, 486.

INFERIOR QUALITY—CONSTRUCTION OF PLEADINGS.

2. In an action for breach of contract to purchase hay where defendant alleged that plaintiff agreed to sell them good, No. 1, merchantable hay, a reply denying that the hay delivered was not good or merchantable

and controverting all other allegations of new matter in the answer, is equivalent to denying that plaintiff stipulated to sell No. 1 hay, and evidence that the hay delivered was merchantable is within the issues.

Eaton v. Blackburn, 22.

WORDS MERCHANTABLE AND MARKETABLE.

3. The words "merchantable" and "marketable" are practically synonymous, as applied to property sold by quality and description.

Eaton v. Blackburn, 22.

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SHIPPING.

TORTS—JOINT AND SEVERAL LIABILITY.

1. If an injury to a bridge by a passing vessel is caused by negligence in undertaking the voyage under the circumstances, and that negligence was the proximate cause of the injury, all persons controlling or participating in the voyage will be jointly and severally liable; but if the injury was due to negligent navigation after the voyage was begun, those concerned in the navigation will be alone liable.

Multnomah County v. Willamette Towing Co. 204

CHARTER—LIABILITY FOR MANAGEMENT OF VESSEL.

2. A charter party which leaves the vessel in charge of a master employed by the owners, who are to furnish a full complement of men, provide provisions, pay expenses (except fuel, port charges, expenses of loading and the like), is not a demise of the vessel, but a freighting contract, and the charterer is not liable for the acts of the officers and crew in the management of the vessel.

Multnomah County v. Willamette Towing Co. 204

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Definition of Local and Special Statutes. See CONST. LAW, 7.

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SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE—CONDITION PRECEDENT.

1. Where a contract of employment stipulated that inventions made by the employee should be the property of the employer, and the employee

made inventions, and incurred expenses in making applications and procuring patents, the employer must, in order to compel the employee to surrender title to the patents, pay the expenses incurred.

Portland Iron Works v. Willett, 245.

CONTRACT TO INVENT—DEGREE OF PROOF.

2. To warrant a decree for the specific performance of a contract stipulating that the inventions of an employee made during his employment shall become the property of the employer, the contract must be clearly proven and its terms as to subject-matter, consideration and other essentials must be specific.

Portland Iron Works v. Willett, 245.

SUIT AS WAIVER OF INCUMBRANCE.

4. A vendee having a contract to purchase as soon as he may desire after the vendor's title shall be perfected may waive the preliminary requirement of title and demand a deed at any time, and the bringing of a suit for specific performance is such a waiver, though the title must be subsequently perfected within a reasonable time.

West v. Washington Railway Co. 436.

SCOPE OF RELIEF AFFORDED.

5. Where a vendor has leased property with an option to the lessee to purchase during the term, and then refuses to perform upon demand and retakes possession, the lessee is entitled to a decree restoring the possession, and directing the vendor to execute a deed upon payment of the contract price if the vendee so desires.

West v. Washington Railway Co. 436.

DAMAGES.

6. In a suit for specific performance, the court having acquired jurisdiction, may assess such damages as appear to have been sustained prior to the filing of the complaint as incidental to the remedy of specific performance.

West v. Washington Railway Co. 436.

ORAL CONTRACT TO SELL—WRITINGS.

7. Where a parol contract is sufficiently definite to be specifically enforceable, the right to such relief is not affected by the fact that a written memorandum of the contract subsequently prepared and signed by the vendor and tendered to the vendee for signature does not correctly state the terms orally agreed upon, since the rights of the parties were fixed before the writing was made, and the latter is only a circumstance in the general history of the controversy.

West v. Washington Railway Co. 436.

DEGREE OF PROOF REQUIRED.

8. One seeking the specific performance of an oral contract need not establish a clear and definite contract beyond a reasonable doubt, but it will be sufficient to satisfy the court that the contract was made as claimed by plaintiff.

West v. Washington Railway Co. 436.

EFFECT OF EVIDENCE.

9. In view of the inherent probability of the truth of plaintiff's claim that he was given the right to purchase the land in question, and from the fact that he took possession without objection and made permanent improvements, the conclusion is that the defendant agreed to sell as claimed.

West v. Washington Railway Co. 436.

EFFECT OF INCUMBRANCE.

10. Where, in a suit for specific performance, the complaint alleged that at the time of making the contract defendant was the owner in fee and in possession of the property, and the answer admitted such allega-

tions, and alleged that defendant had been and was the owner of the property which was incumbered by a real estate mortgage, a provision in the contract that the sale should be completed at complainant's option, as soon as title was perfected, did not preclude complainant from waiving release of the mortgage and enforcing specific performance; defendant being entitled to a reasonable time thereafter in which to discharge the mortgage lien.
West v. Washington Railway Co. 436.

NEED OF TENDER AFTER REFUSAL TO ACCEPT.

11. After a vendor has refused to accept further payments on a contract the vendee need not make any additional tender as a condition of enforcing specific performance of such contract.

West v. Washington Railway Co. 436.

STATUTE OF FRAUDS.

EFFECT OF PART PERFORMANCE.

1. Where a lessee takes possession under a lease with an option to purchase during the term at an agreed price, complies with all the terms of the lease, and in addition makes permanent improvements, there is such a part performance of the option as to dispense with the requirements of the statute of frauds.

West v. Washington Railway Co. 436.

EXECUTED CONTRACTS—STATUTE OF FRAUDS.

2. Agreements either oral, or partly written, are binding on the parties and not subject to the statute of frauds, after being executed.

McLeod v. Despain, 536.

STATUTE OF LIMITATIONS. Same as LIMITATION OF ACTIONS.

STATUTES.

TITLE—PLURALITY OF SUBJECTS.

1. Sp. Laws 1903, p. 337, was entitled, "An act to amend" certain specified sections "of an act entitled 'An act to incorporate the City of Salem,' and to repeal an act entitled 'An act to incorporate the City of Salem,' approved October 15, 1862, and an act entitled 'An act to incorporate the City of Salem,' approved February 15, 1893, and to repeal all acts and parts of acts in conflict therewith, approved February 17, 1899, and to amend," certain specified subdivisions of such "act as amended by" certain other sections "of an act entitled 'An act to amend [certain sections] of the * * act,' approved February 15, 1901." Section 1 of the act of 1903 amended the act incorporating the City of Salem by extending the territorial limits thereof so as to include plaintiff's land. Held, that the act of 1903 was not in violation of Const. Or. Art. IV, § 20, requiring that every act shall embrace but one subject, which shall be clearly expressed in its title, etc.

Murphy v. Salem, 54.

TITLES OF AMENDATORY ACTS.

2. The title to an amendatory act is sufficient if it refers to the particular section it is intended to alter, and it will not violate Const. Or. Art. IV, § 20, requiring that every act shall embrace but one subject, which shall be expressed in its title, unless the provisions of the amendment are such as could not have been included in the original act as matters properly connected therewith.

Murphy v. Salem, 54.

TITLE OF ACT—EFFECT OF SLIGHT ERROR—CONSTRUCTION.

3. A slight immaterial error in the title of a legislative act, one that evidently did not mislead or deceive any intelligent person, ought not to be considered as affecting the validity of such act.

Murphy v. Salem, 54.

SAME—CASE UNDER CONSIDERATION.

4. Sp. Laws 1899, p. 921, was entitled "An act to incorporate the City of Salem," and to repeal an act entitled "An act to incorporate the City of Salem," approved October —, 1862, etc., and to repeal all acts and parts of acts in conflict "herewith." Special Laws 1903, p. 337, amending the former act, in purporting to set out its title introduced the number "15" in the space between the word "October" and the number "1862" and changed the word "herewith" to "therewith." *Held*, that the insertion of such number and the substitution of the word were not such defects as should defeat the amendment. *Murphy v. Salem*, 54.

STATUTES—EMERGENCY CLAUSE—CONSTRUCTION OF REFERENDUM AMENDMENT TO STATE CONSTITUTION.

5. The Initiative and referendum amendment of 1902 to Section 1 of Article IV of the Constitution of Oregon, reserving to the people the right to reject any act of the legislature, "except as to laws necessary for the immediate preservation of the public peace, health or safety," must be read in connection with and as a part of Section 28 of the same article, providing that no act shall take effect until ninety days from the end of the session at which it was passed, except in case of an emergency, which must be declared in the act, the effect of which is that only those acts can immediately go into effect that are declared by the legislature in the act itself to be necessary for the immediate preservation of the public peace, health or safety. *Sears v. Multnomah County*, 42.

SAME—CASE UNDER CONSIDERATION.

6. The act of 1903, granting to a certain class of circuit judges an increased salary, passed with an emergency clause reciting that whereas the compensation of certain judges was inadequate an emergency was declared, and the act should take effect on its approval (Laws Sp. Sess. 1903, p. 14, § 2), did not take effect on its approval by the governor, since the emergency clause did not declare the act to be necessary for the immediate preservation of the public peace, health or safety, as required by the constitutional amendment of 1902.

Sears v. Multnomah County, 42.

AMENDMENT—EFFECT OF RE-ENACTING FORMER STATUTE.

7. A re-enactment of a former statute is considered as a continuation of the language so repeated and not a new enactment as of that date, and the same rule applies to the use of terms synonymous with those in the prior statute. *Renshaw v. Lane County Court*, 526.

SAME—CHARTER OF EUGENE.

8. In the statute of 1905, reincorporating the City of Eugene and repealing all acts and parts of acts in conflict therewith, the amendment empowering the common council to license, tax, regulate or prohibit bar-rooms, drinking shops * * and places where spirituous, malt, vinous or intoxicating liquors are sold (Sp. Laws, 1905, pp. 243, 250, § 48, subd. 18), did not amend the old charter respecting the power to prohibit, the word "Intoxicating" used in the new charter being a synonym of the kinds of liquor specified in the old charter. *Renshaw v. Lane County Court*, 526.

CURING IRREGULARITIES AND OMISSIONS.

9. The legislature may subsequently cure such omissions or irregularities in the proceedings of public officers as might have been originally dispensed with. *Ayers v. Lund*, 303.

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PRINCIPAL AND SURETY—RIGHTS OF SURETY AS TO PRINCIPAL—RIGHT AFTER PAYMENT—REIMBURSEMENT AND SUBROGATION.

Where the plaintiff had been a surety on a note, but subsequently bought it, the assignment to him was not a discharge of the note, but entitled him to be subrogated to the rights of the creditor against his principal, and to foreclose a mortgage given to secure the note.

Marsters v. Umpqua Oil Co. 374.

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TAXATION.

TAXES—METHOD REQUIRED TO COLLECT—JURISDICTION OF EQUITY.

1. The method of collecting taxes prescribed by statute is the one that must be pursued by the public authorities for that purpose.

Multnomah County v. Portland Cracker Co. 345.

SAME—CASE UNDER CONSIDERATION.

2. Where a statute requires the tax collector to return to the office of the county clerk a roll showing the uncollected taxes and directs that the clerk make therefrom a delinquent roll with a warrant to the tax collector to collect the sums thereon stated from the persons against whom they are assessed, the record thus provided for is exclusive, and the fact that extraneous memoranda or notations to the effect that the taxes have been remitted are allowed to be made on the record by strangers affords no reason why the clerk should not issue the delinquent warrant or the sheriff enforce it as directed, and a court of equity should not undertake to cancel such notations, for they are obviously void as they appear.

Multnomah County v. Portland Cracker Co. 345.

JURISDICTION OF EQUITY—REMEDY AT LAW—MONEY JUDGMENT.

3. The rule that equity will retain control of a case and do full justice between the parties, even to a money judgment, after it has acquired jurisdiction on an equitable ground, cannot be invoked in a case where all the equitable grounds have failed—there the only questions before the court are legal and the law courts afford an adequate remedy.

Multnomah County v. Portland Cracker Co. 345.

SAME—CASE UNDER CONSIDERATION.

4. In a suit to cancel alleged fraudulent entries on public records and to recover the amount of a tax which purported to be cancelled by such entries, the decree granting all the relief asked cannot be sustained as to the judgment for the tax where it appears that all the entries are either void on their face or have already been set aside by the court having control of the records, for the statutes afford sufficient means of collecting the tax without the intervention of a court of equity.

Multnomah County v. Portland Cracker Co. 345.

CURATIVE STATUTE—RETROACTIVE EFFECT—TAXATION—LEVY.

5. Under the rule that the legislature may subsequently cure such omissions or irregularities in the proceedings of public officers as might have been originally dispensed with, it is competent to enact that sales for taxes theretofore made shall be valid, notwithstanding the required levy was not made as required by statute.

Ayers v. Lund, 303.

SAME—CASE UNDER CONSIDERATION

6. By Hill's Ann. Laws 1892, §§ 2814, 2816, the sheriff was required, under his warrant, when resort was had to real estate for the collection of taxes, to levy on the property before advertising it for sale. Section 3135 of B. & C. Comp., enacted afterwards, provides that sales of land for taxes theretofore or thereafter made to counties shall be void notwith-

standing the omission of the sheriff to make a levy. *Held*, that a sale made before the passage of the latter act without a levy by the sheriff was validated by the passage of such act, since it was an omission in the proceedings of a public officer which it was competent for the legislature to cure by retroactive enactment. *Ayers v. Lund*, 303.

TAX DEEDS—BURDEN OF PROOF TO MAINTAIN.

7. Unless otherwise specially provided, the claimant under a tax deed has the burden of proof as to its validity. *Ayers v. Lund*, 303.

SALES TO COUNTY—EFFECT OF DEED.

8. Section 3127, B. & C. Comp., which provides that where real property shall be sold to a private purchaser at a tax sale, the sheriff's deed shall be *prima facie* evidence that the statutory requirements have been fully complied with, does not apply to sales to counties, as no deeds are required in such cases. *Ayers v. Lund*, 303.

RECITALS IN TAX DEEDS AS EVIDENCE.

9. The provisions of Section 3135, B. & C. Comp., that deeds given by the sheriff at sales of real property shall be conclusive evidence of the regularity and existence of all proceedings to pass title, etc., apply only to the regularity and existence of such proceedings as are the foundation of the deed, and do not operate as evidence of the regularity and existence of the proceedings necessary to transfer the tax debtor's title to the county. *Ayers v. Lund*, 303.

SUFFICIENCY OF RETURN OF SALE.

10. A return of the officer making a tax sale, consisting of a printed notice of the tax sale cut from a newspaper, headed, "Sheriff's Sale for Delinquent Taxes," which was attached to the delinquent tax roll and upon which was interlined or written at the time of or after the sale, opposite the name and description of the property, the name of the purchaser and the selling price in each case, to which was attached this certificate: "The foregoing return of delinquent tax sales for the year 1898 is true and correct in every detail. Dated the 27th of October, 1899"—is not in compliance with B. & C. Comp. §§ 3118, 245, 1014, providing that the warrant for the collection of delinquent taxes must be executed and returned as an execution against property, and that a sheriff must make written return of an execution setting forth his doings thereon. *Ayers v. Lund*, 303.

REDEMPTION FROM TAX SALES—EFFECT OF DEED.

11. Under Sections 3124, 3125 and 3127, B. & C. Comp., providing for redemption from tax sales of real property within a fixed time and for the issuing of a deed by the sheriff to the holder of the certificate of tax sale, no redemption can be made in any manner after the tax deed has been issued, and by such a deed the grantee acquires all the title held by the former owner. *Hendershott v. Sagsvoid*, 592.

TAX SALES—REMEDY AGAINST TAX DEED CLAIMANT.

12. Where the proceedings leading up to a tax sale and deed are void, the remedy of the owner is at law, unless he may bring a suit under B. & C. Comp. § 516, authorizing one claiming an interest in real estate not in the actual possession of another to maintain a suit against another claiming an estate therein to determine conflicting interests. *Hendershott v. Sagsvoid*, 592.

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TRESPASS.**INFORMATION—PLEADING EXCEPTION.**

1. An information for trespass, drawn under Section 1830, B. & C. Comp., providing that if any person other than an officer on lawful business shall go upon any premises not his own, etc., he shall be guilty of a misdemeanor, must show affirmatively that the person charged was not such officer, and that he did not own the premises. *Binhoff v. State*, 419.

SUFFICIENT ALLEGATION OF OWNERSHIP.

2. An information for trespass in which it is alleged that the premises in question were owned by a named person other than defendant does not show that defendant may not have been the owner and therefore not guilty under Section 1830 of B. & C. Comp., for the word "owner" has a variety of meanings, some of which do not include a fee-simple estate.

Binhoff v. State, 419.

MEANING OF WORD "OWNER."

3. The term "owner," as used in B. & C. Comp. §1830, prohibiting a trespass by one not the owner of the land nor an officer on lawful business, is not limited to the holder of the fee-simple estate, but also includes one holding merely a usufructuary interest. *Binhoff v. State*, 419.

Right of Trespasser to Make Appropriation. See **WATERS**, 18.

TRIAL.**ORDER OF RECEIVING EVIDENCE—DISCRETION.**

1. In the trial of a case a large discretion must rest with the judge as to the order of receiving proof and the examination of witnesses, and a refusal to permit a plaintiff to read to the jury a paper identified by

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defendant on cross-examination will not be reviewed, as plaintiff was not entitled—except by permission—to offer further evidence after closing its case.

Multnomah County v. Willamette Towing Co. 204.

NEGLIGENCE—PROOFS PERMISSIBLE UNDER GENERAL DENIALS.

2. In actions for damages caused by negligence, though caused by a vessel, defendants can show under a general denial that the acts causing the injury were done by persons for whose negligence they were not liable, this being a denial of a merely evidentiary matter and not of the cause of action. This right based on the denials is not affected by the fact that affirmative defenses stating the negligence of such other persons were rejected by the court on motions and demurrers.

Multnomah County v. Willamette Towing Co. 204.

WITNESS—INDICATING EXPECTED ANSWER.

3. A request of an expert witness: "State whether or not this hay you saw there is considered as marketable hay here in Baker City, compared with other kind that is sold here"—sufficiently advised the court as to what was sought to be proved by the witness so that the court could determine whether the answer was material and relevant without a statement by counsel.

Eaton v. Blackburn, 22.

NONSUIT—QUESTIONS THAT MAY BE DECIDED.

4. On a motion for a nonsuit, the court has no authority to pass on the merits or adjudicate the rights of the parties, and an attempt to do so is a nullity; such a motion is an objection to the sufficiency of plaintiff's case and does not involve the merits of the claim at all.

Carroll v. Grande Ronde Electric Co. 477.

SAME—CASE UNDER CONSIDERATION.

5. In an action for wrongful death, defendant's motion for a nonsuit, on the ground that deceased was guilty of contributory negligence, was granted, the record entry reciting that the deceased was guilty of contributory negligence which was the proximate cause of the injury. Held, that the judgment was no bar to a subsequent action on the same cause, the only point properly decided being that plaintiff's case, as presented, was not sufficient in law to be submitted to the jury.

Carroll v. Grande Ronde Electric Co. 477.

WHEN ISSUES ARE ACCOMPLISHED.

6. Before a case can be said to be ready for trial under Section 113, B. & C. Comp., which defines a trial, the case must be at issue on either law or facts as to all parties, and no trial can be demanded when some parties have answered and others have moved or demurred.

Mulkey v. Day, 312.

DIRECTING VERDICT ON CONFLICTING EVIDENCE.

7. A trial judge acts clearly within his discretion in refusing to direct a verdict where the evidence is conflicting as to the actual occurrences and the credibility of witnesses.

Multnomah County v. Willamette Towing Co. 204.

INVADING PROVINCE OF JURY.

8. The jury being the exclusive judges of the facts under Section 139, B. & C. Comp., trial courts must refrain from remarks that may be construed as expressing a conclusion or inference from the evidence.

State v. Bock, 25; *Keen v. Keen*, 362.

INSTRUCTIONS—REQUESTS—GENERAL CHARGE.

9. Refusal to give requested instructions is not error where the law applicable to the facts involved is given fully in the general charge.

Baines v. Coos Bay Navigation Co. 192.

INSTRUCTIONS MUST BE CONSIDERED AS A WHOLE.

10. Instructions to a jury must be considered as a whole, and, if they are substantially correct and could not have misled the jury, the judgment will not be reversed because some instruction considered alone may be subject to criticism. *State v. Megorden, 259.*

REFUSING REQUESTS ALREADY COVERED.

11. Refusal to give specially requested instructions already covered by the charge given is not error, though such requests are correct statements of the law. *State v. Megorden, 259.*

INSTRUCTION NOT BASED ON FACTS.

12. An instruction which begins with a sentence inapplicable to the facts in a murder trial is properly refused. *State v. Megorden, 259.*

CAUTIONARY INSTRUCTIONS USUALLY DISCRETIONARY.

13. Cautionary instructions, where there is nothing in the circumstances of the case making them necessary, are within the discretion of the court. *State v. Megorden, 259.*

SUBMITTING ISSUES OUTSIDE THE PLEADINGS.

14. Care should be exercised to instruct juries only as to matters covered by the pleadings, and instructions on issues not so fixed are erroneous, justifying a reversal, even though the evidence on which the instruction is based was received without objection. *Latourette v. Meldrum.*

TRIAL JUDGES Must Not Comment on the Evidence. See **TRIAL, 8.**

TRUSTS AND TRUSTEES.**SUIT BY TRUSTEE—COLLATERAL ISSUES BETWEEN BENEFICIARIES.**

In a suit by a trustee to foreclose a mortgage made to her in her trust capacity, collateral issues between the beneficiaries as to matters between themselves, and not going to the merits of the suit, should not be permitted, and if such issues do appear in the pleadings, they should be ignored in the findings. *Wright v. Conservative Investment Co. 177.*

Effect of Signing Obligation as "Trustee." See **BILLS & NOTES, 2.**

Circumstances Affecting Oblige. See **NOTICE, 1.**

TURNPIKES AND TOLL ROADS.**ESTABLISHMENT—LEASE OF ROAD.**

1. A county contracted with a toll road company by which the county leased to the company for a specified term a county road to be repaired and maintained by it in the location of the toll road. The lease recited that the road was a public burden, requiring large expenditures of money to maintain it, as an inducing cause for the lease. *Heid*, that the contract was a lease enforceable under B. & C. Comp. §§ 4937-4950, relating to counties leasing public roads and fixing a rate of toll, etc., and was not an agreement executed under Sections 5074, 5077, relating to proceedings to condemn land for a public use.

Tillamook County v. Wilson River Road Co. 309.

ACTION—JOINDER OF ACTIONS.

2. A county in a suit for the forfeiture of a lease of a county road for failure of the lessee to comply with the terms thereof cannot join a claim to avoid the lease because made without authority or not fully executed. *Tillamook County v. Wilson River Road Co. 309.*

ACTION—COURTS—JURISDICTION.

3. Under B. & C. Comp. § 4946, authorizing the district attorney of a county to "maintain an action" against a lessee of a county road to have the lease declared forfeited for failure to comply with its provisions, etc., the proceeding referred to is a suit for cancellation and not a law action.

Tillamook County v. Wilson River Road Co. 309.

UNANSWERED QUESTION.

Need of Stating Answer Expected From Witness. See **APPEAL**, 11.

UNDUE INFLUENCE.

Example of Will Not Unduly Influenced. See **WILLS**, 3.

VACATING VOID ORDERS or Judgments. See **COURTS**, 3.

VAGRANCY.

Power to Define and Punish. See **MUNICIPAL CORPORATIONS**, 6.

VARIANCE. See **PLEADING**, 3, 4.

VENDOR AND PURCHASER.

SPECIFIC PERFORMANCE—NEED OF TENDER AFTER REFUSAL TO ACCEPT.

1. After a vendor has refused to accept further payments on a contract the vendee need not make any additional tender as a condition of enforcing specific performance of such contract.

West v. Washington Railway Co. 436.

DRUNKENNESS—EXCESSIVE PRICE—FRAUD—BURDEN OF PROOF.

2. Where it appears that the price paid by an intoxicated purchaser was exorbitant, and the transaction is questioned for fraud, the burden of proof in showing that advantage was not taken of such purchaser rests on the vendor.

Fagan v. Wiley. 480.

VENUE.

CHANGING VENUE—DISCRETION—REVIEW.

The right to grant a change of venue rests in the sound discretion of the trial court, and its decision will not be disturbed, unless there is a clear abuse of discretion.

Multnomah County v. Willamette Towing Co. 204.

VERDICT.

Curative Effect of on Indefinite Complaint. See **PLEADING**, 15.

Propriety of Directing Verdict—Disputed Facts. See **TRIAL**, 7.

VESSELS. See **SHIPPING**.

VOID ORDERS. Vacation of by Court. See **COURTS**, 3.

VOLUNTARY PAYMENT.

Effect of Paying Pending an Appeal. See **APPEAL**, 4.

WAIVERS.

Objections Not Presented to Trial Court. See **APPEAL**, 3, 9.

Technical Defects—Result of Trial. See **PLEADING**, 9.

Contract to Purchase—Requirement of Title. See **SPEC. PERF.** 4.

WATERS.

ORAL EVIDENCE TO LIMIT MEANING OF DEED IN CHAIN OF TITLE.

1. Parol evidence is admissible by a grantor of the right to the full and free use of the waters of a stream appurtenant to certain land to show that such grant meant only the surplus water not used on another tract owned by the grantor further up the stream. *Gardner v. Wright.* 609.

INTERRUPTION OF ADVERSE POSSESSION.

2. Adverse use of the waters of a stream, as a defense to a suit to determine rights thereto, may be defeated by showing that the use during the irrigation seasons for the statutory time was not continuous or by proof that such use did not substantially interfere with plaintiff's rights.
Gardner v. Wright, 609.

BURDEN OF PROOF AS TO ADVERSE POSSESSION.

3. Though an adverse right cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by permission or subserviency, or not to have been continuous, is upon him who attempts to defeat the claim.
Gardner v. Wright, 609.

ACTS CONSTITUTING ADVERSE POSSESSION.

4. Where a claimant of water has for the period of limitations required all the water of a certain stream to supply his needs, the use for that period of a considerable portion of such water by an adverse claimant has constituted an invasion of the rights of the original claimant for that period and establishes a *prima facie* case of adverse possession.

Gardner v. Wright, 609.

ADVERSE POSSESSION—EFFECT OF SUBSEQUENT POSSESSION BY GRANTOR.

5. One relying upon adverse possession as against the grantee of his predecessor must show that there was a change in the relation of the parties respecting the rights involved, any unexplained possession being presumed to be subservient to the title conveyed; and, in order to avail himself of the laches of the grantee or his assigns or of the statute of limitations, the grantor must show that actual or constructive knowledge of the change in the relations was brought home to the grantee or his successors in interest.

Gardner v. Wright, 609.

ADVERSE POSSESSION—EFFECT OF SUBSEQUENT ACQUISITION OF TITLE TO PROPERTY BY GRANTOR.

6. Subsequent possession by the grantor of land under claim of ownership, etc., for the period prescribed by the statute of limitations, will not necessarily inure to the grantee's benefit, and title by adverse possession may be acquired by the grantor under such circumstances; but, if possession is held in subserviency to the grantee's title, it will inure to his benefit.

Gardner v. Wright, 609.

SUBSEQUENT ADVERSE USER BY GRANTOR—DISCLAIMER.

7. A showing that after a land owner had deeded his farm with the full use of a stream flowing through it, he openly used part of the water from that stream on land that he afterward acquired further up, under posted and recorded notices, with the general knowledge of the community, establishes a disclaimer against the deed, and is sufficient to charge the owners of the deeded land with notice that he did not intend to be bound by the covenants therein, though, of itself, such showing does not establish adverse user.

Gardner v. Wright, 609.

ADVERSE USER—WHEN STATUTE OF LIMITATIONS BEGINS.

8. The statute of limitations begins to run in favor of an adverse claim to the waters of a stream when the conduct of the adverse claimant indicates an intention to claim and hold the water against all other persons, and such conduct is supported by an actual diversion for a beneficial purpose of sufficient proportions to show good faith.

Gardner v. Wright, 609.

EFFECT OF RUNNING OF STATUTE ON ADVERSE CLAIMANT.

9. Where one permits ten years to elapse without regaining control over water to which another has exercised an adverse claim subsequent in date, unless such use was permissive or of such a character as not to constitute an invasion of the rights of the first claimant, the adverse claim becomes a complete title. *Gardner v. Wright*, 609.

EFFECT OF SLIGHT INTERRUPTIONS.

10. Under the express terms of B. & C. Comp. § 4, plaintiffs could not sue to determine water rights, unless they or their predecessors were possessed of the property within ten years before the commencement of the suit, and such possession must have been such a re-entry or recapture of the use of the water as can be termed complete control, slight interruptions not affecting the running of the statute against one in adverse possession. *Gardner v. Wright*, 609.

INTERRUPTION OF ADVERSE USE BY THIRD PARTIES.

11. Claims of adverse possession or use must be determined by the acts of parties to the litigation and their grantors, and interruptions by others cannot be considered. *Gardner v. Wright*, 609.

USE DURING DIFFERENT PARTS OF THE YEAR.

12. One may establish a right to the use of water from a stream during one part of a year, while another person may at the same time acquire a right to use the water from the same stream for the remainder of the year. *Gardner v. Wright*, 609.

WATERS FLOWING IN DITCHES AS REAL PROPERTY.

13. Whether the ownership of ditches and the assertion of the right to convey water through them is real property is referred to but not decided. *State ex rel. v. Small*, 595.

BURDEN OF PROOF UNDER CLAIM OF PRIOR APPROPRIATION.

14. Under the general rule that the pleader has the burden of proof as to his affirmative allegations, it is incumbent upon one who asserts the title to certain water by prior appropriation to satisfactorily prove his claim. *Gardner v. Wright*, 609.

RIGHT BY RELATION—CONTINUITY OF APPROPRIATION.

15. Where the increase in the area of arable land for the irrigation of which water has been diverted varies with and is measured by the lapse of time, the additional application of water annually to meet the augmented demand, provided the appropriation is completed within a reasonable time, causes the entire appropriation to relate back to its inception, thereby cutting off all intervening rights of adverse claimants.

Seawear v. Pacific Livestock Co. 157.

TIME ALLOWED TO EXTEND APPROPRIATION.

16. The application of appropriated water to a beneficial purpose must be made with reasonable promptness, in view of the means of the appropriator and the physical obstacles encountered; and the same rule applies to extending the use or the enlargement of the cultivated area to be irrigated. *Seawear v. Pacific Livestock Co.* 157.

EXAMPLE OF UNNECESSARY DELAY IN ENLARGING USE OF WATER.

17. A delay of five years in extending the use of water to additional ground or other uses is *prima facie* unreasonable, and appropriations from the same source made during those years are superior to the claim of the original appropriator for more water than was being used when work ceased. *Seawear v. Pacific Livestock Co.* 157.

RIGHT OF APPROPRIATION BY TRESPASSER.

18. The rights acquired by the appropriation of water to be used on land in possession of a trespasser are considered but not decided. In the present case the allotment is sustained because the land has since passed to the true owner who is using the water for proper purposes.

Seaward v. Pacific Livestock Co. 157.

NEGLECT TO USE IS ABANDONMENT.

19. A delay of several years in using waters under an initiated but inchoate right amounts to an abandonment. *Gardner v. Wright*, 609.

ESTOPPEL BY DEED AGAINST AFTER-ACQUIRED TITLE.

20. An after-acquired title to water rights by the grantor will not inure to the benefit of the grantee, where the grantee knew at the time of the transfer that the grantor had no title and did not expect him to procure one, or where the title purported to be conveyed was an inchoate interest, the completion or forfeiture of which depended upon some acts to be performed, or diligence to be exercised by the grantee, and the grantee has forfeited his inchoate right by neglect.

Gardner v. Wright, 609.

IRRIGATION REQUIREMENT PER ACRE.

21. In testifying as to the amount of water required to properly irrigate a given tract of land it is desirable to have in the record the facts on which witnesses base their estimates; but in this case the court will adopt the opinion that an inch an acre is sufficient for both domestic and irrigation purposes.

Gardner v. Wright, 609.

MEASUREMENT OF WATER—"SECOND FEET"—"MINER'S INCHES."

22. The term "miner's inch" is so indefinite and inexact that it is not satisfactory as a standard for measuring water, and this court prefers "second feet," or the quantity of water flowing past a given point in a given space of time under a six-inch pressure.

Gardner v. Wright, 609.

RIGHT OF SUBSEQUENT CLAIMANTS TO USE WATER NOT IN ACTUAL USE BY PRIOR CLAIMANTS.

23. In a case where several appropriators have a right to use the waters of a stream, water not in use for actual requirements should not be diverted or detained, but it should be allowed to pass to the use of the others, all being limited to their actual needs to the extent of their respective appropriations. Appropriators cannot either permanently or temporarily divert water without using it as against the needs of subsequent appropriators.

Gardner v. Wright, 609.

WHARVES.

Right of Upland Owner to Wharf Out. See NAVIGABLE WATERS, 1. 2.

WILLS.

MENTAL CAPACITY—CASE UNDER CONSIDERATION.

1. The testator who executed the will under consideration was 68 years old, blind, and in gradually falling health from a progressive hardening of the arteries which resulted in physical prostration, owing to inability to control any muscles, and a gradual failure of mind followed by death from want of arterial blood. It appeared, however, by the positive testimony of persons present, that at the time the will was executed testator was in possession of his mental faculties, recognized the persons present and stated that he knew the contents of the will and was satisfied with it. Opposed to this was the testimony of his physician and of medical experts

that he could not at that period of his sickness have had mental power to know what he owned or who were his natural beneficiaries, unless the property was of such a nature as to be easily divided among a few persons. Positive reliable testimony of what actually occurred seems more convincing than opinion testimony that such an occurrence was impossible, and it is the conclusion of the court that the testator had testamentary capacity, notwithstanding his debilitated condition.

Pickett's Will, 127.

EXECUTION BY ANOTHER FOR A BLIND TESTATOR.

2. The signing of a will for a blind person by another at the request of the testator, where the latter can hear and speak and is present, is sufficient; and the same rules applies to the witnessing.

Pickett's Will, 127.

EVIDENCE OF UNDUE INFLUENCE.

3. In view of the positive nature of the testator, that in framing his will he carried out a plan stated long previously, and that there is no direct testimony of any attempt to influence him, it must be concluded that the will in question is the product of his unrestrained wish and is valid.

Pickett's Will, 127.

BURDEN OF PROOF IN PROBATING.

4. In probating a will in both common and solemn form the burden of proof is on the proponent to establish the testamentary capacity of the testator and the regular and free execution of the document presented for probate.

Pickett's Will, 127.

DEED DISTINGUISHED FROM WILL.

5. Plaintiff and her husband being aged, and she in bad health, and both desiring to make testamentary disposition of their property, she conveyed land to him, the deed to take effect on her death. At the same time the husband made a will, and both instruments were placed in an envelope and deposited by a third person in a bank, where they remained until the husband's death, when the will was removed. *Held*, that plaintiff had no intention to part with the control of the deed presently, and that it was testamentary and hence revocable.

Sappingfield v. King, 102.

ENFORCEMENT OF MUTUAL WILLS—EVIDENCE REQUIRED.

6. Whatever may be held by various courts as to the validity of testamentary deeds and wills reciprocally executed for a valuable consideration, they are all agreed, and this court now holds, that the evidence must be full and convincing as to the terms of the agreement, and that the instruments in question were made with the mutual intention of complying therewith. The evidence in this case does not show that there was even an agreement.

Sappingfield v. King, 102.

SAME—CASE UNDER CONSIDERATION.

7. Where a husband and wife, advanced in years, and each owning separate property, agreed that they would have their wills made, and he made a will giving her a life estate in his property, and she conveyed her property to him, the deed to take effect on her death, but it does not appear that any agreement was made between them as to the terms of the will, or that one was to be the consideration for the other, a contention that the deed and the will were mutual and reciprocal, and for that reason irrevocable, is without merit.

Sappingfield v. King, 102.

ESTABLISHMENT OF LOST WILLS—BURDEN OF PROOF.

8. Where a will is shown to be lost, secondary evidence is admissible to show its contents, the burden being upon the proponent to clearly establish its execution. *Miller's Will*, 452.

LOST WILL—PRESUMPTION OF REVOCATION FROM POSSESSION BY TESTATOR.

9. If, when last seen, a will was in the possession of the testatrix, and cannot be found, it will be presumed, in the absence of other evidence, that she destroyed it. *Miller's Will*, 452; *McCoy's Will*, 579.

SAME—PRESUMPTION AS TO REVOCATION FROM POSSESSION BY STRANGER.

10. In a proceeding for the probate of a lost will, where the possession of the will is shown to have been intrusted to a third person, the burden of retracing it into the hands of the testatrix is upon the contestant. *Miller's Will*, 452.

SAME—PRESUMPTION FROM EXECUTION.

11. Where, in a proceeding to probate a lost will, it is shown that the will was duly executed, the presumption of law is strong in its favor, and its revocation must be clearly proven. *Miller's Will*, 452.

LOST WILL—COMPETENCY OF DECLARATIONS OF TESTATRIX CONCERNING SUCH WILL AND HER FEELINGS TOWARD DEVISEES.

12. In a proceeding to probate a lost will, declarations made by the decedent subsequent to the execution of the will, and within a reasonable time prior to her death, showing it to have been deposited with a third person, and that it was still there to within a few days of her death, and declarations showing her affection for the devisees, with no change in her feelings toward them, when corroborated by direct evidence that after making the declarations she had no opportunity of withdrawing the will, are admissible as a basis for an inference that the will had not been returned to her possession or canceled. *Miller's Will*, 452.

LAST WILL—EVIDENCE OF DECLARATIONS OF TESTATOR.

13. In a proceeding to establish and probate a lost will, declarations of the testator, whether indicating an intention not to adhere to the will as his will, or indicating an intention to adhere to it, are admissible. *McCoy's Will*, 579.

CONSTRUCTION—EFFECT OF BENEFIT TO WITNESS.

14. Under Section 5584, B. & C. Comp., providing that if any witness to a will shall receive thereunder any beneficial appointment affecting any property passing under the will it shall be void, a provision in a will appointing a certain attorney to assist the executor in settling the estate neither gives nor makes to such attorney any beneficial appointment of or affecting any real or personal estate so as to affect his qualification as a witness, since it is merely advisory. *Pickett's Will*, 127.

CONSTRUCTION—EFFECT OF SUGGESTING ATTORNEY FOR EXECUTOR.

15. The appointment of an attorney to advise an executor is a matter entirely personal to such officer, and he is not bound by any provisions or suggestions in the will. *Pickett's Will*, 127.

SPECIFIC BEQUEST DEFINED.

16. A specific bequest is a testamentary gift of a part of testator's personalty so accurately described that it can be identified from all other things of its kind. *Noon's Estate*, 286.

SPECIFIC BEQUEST—SUFFICIENT DESCRIPTION OF CORPORATION STOCK.

17. A description of corporate stock bequeathed is sufficiently definite to make the bequest specific if referred to as "my stock," and the identification of the certificate will carry the gift. *Noon's Estate*, 286.

INTENT—SPECIFIC BEQUEST.

18. Specific bequests are not favored, but the wish of the testator will be carried out where the intent is clearly expressed. For instance: A bequest of "all the shares of the N. B. Co. standing in my name in said company at the time of my decease" is sufficiently definite and certain to make clear the testator's intent and require such stock to be considered a special bequest, under Section 1172, B. & C. Comp., and therefore exempt from liability for the payment of debts until a resort thereto shall be necessary by reason of a failure to pay debts from the proceeds of the sale of the remaining property not specifically devised or bequeathed.

Noon's Estate, 286.

CONSTRUCTION OF SPECIFIC BEQUEST—DIVIDENDS ON STOCK.

19. A special devise of corporate stock carries dividends accruing thereon, and such dividends stand on the same footing as the stock itself, with reference to unpaid debts.

Noon's Estate, 286.

WITNESSES.

EXPERT—EFFECT AND SCOPE OF OBJECTION.

1. An objection to a question asked of an expert that it is "incompetent, irrelevant and immaterial, upon the ground that a proper hypothesis or foundation had not been laid for asking the question," goes only to the competency of the question.

State v. Megorden, 259.

EXPERT WITNESS—HYPOTHETICAL QUESTION.

2. Where an expert has examined a wound and described it to the jury, it is not necessary to propound in a hypothetical form a question as to its effect.

State v. Megorden, 259.

EXPERT—THEORETICAL KNOWLEDGE—COMPETENCY.

3. A regularly graduated, licensed and practicing physician is competent to testify as to the effect of a blow on a person's head as described by other witnesses, although he had never seen or treated a case of the kind.

State v. Megorden, 259.

LEADING QUESTIONS ARE DISCRETIONARY.

4. It is discretionary with the trial judge to permit or refuse leading questions, and where he permits such questions to be asked of children 14 and 18 years of age who are called as witnesses against their father on a trial for killing their mother, he has acted wisely.

State v. Megorden, 259.

COMPETENCY OF INTERESTED PERSON.

5. The testimony of witnesses is not to be disregarded merely because they are interested in the result.

Miller's Will, 452.

SCOPE OF CROSS-EXAMINATION.

6. There is no error in refusing to allow a witness to be cross-examined as to a matter to which his direct examination does not relate.

Morse v. Odell, 118; *Multnomah County v. Willamette Towing Co.* 204.

PRIVILEGED COMMUNICATIONS AS EVIDENCE—HUSBAND AND WIFE.

7. One of the exceptions to the rule forbidding evidence of communications occurring between husband and wife during their marriage is the protection of the personal rights or liberty of the one to whom they

were made, and for that purpose such evidence is competent without the consent of the other spouse. *State v. Luper*, 605.

Endorsing Names of Witnesses. See INDICTMENT & INFORMATION, 2.

Effect of Recommendation of Attorney. See WILLS, 14.

Privilege of Exemption From Testifying. See CONTEMPT, 9.

WRITINGS. Conclusiveness of. See SPECIFIC PERFORMANCE, 7.

WORDS AND PHRASES.

"CONVICTED."

Whether one who has pleaded guilty has been "convicted" of the offense with which he is charged is discussed but not decided.

Ex parte Tanner, 31.

"DESIGN."

In a contract providing that an originator and machinist should enter the employ of a manufacturer with the understanding that drawings, patterns and "designs" of machinery made by such employee should belong to the employer, the term "designs" was intended to mean any new machine or an improvement of a machine evolved by the employee, and was not used in the sense of ornamental plan.

Portland Iron Works v. Willett, 245.

"DISTRICT."

The term "district," used in Const. Or. Art. IV, § 1a, reserving the initiative powers to the legal voters of municipalities and districts, means a specified territory set aside from the rest of the state and organized to promote those conveniences of the public at large that are inherently local and special.

Acme Dairy Co. v. Astoria, 520, 523.

"GAMBLING DEVICE."

A gambling device is any contrivance by the operation of which chances are determined whereby money or property is lost or won.

State v. Ayers, 61, 69.

"GROSSLY."

The selling of pools on horse races is an act which "grossly" disturbs the public peace and welfare, under Section 1930, B. & C. Comp.

State v. Ayers, 61.

"MARKETABLE."

As applied to property sold by quality and description the term "marketable" is equivalent to "merchantable." *Eaton v. Blackburn*, 22.

"MERCHANTABLE."

The words "marketable" and "merchantable" are practically synonymous as applied to property sold by quality and description.

Eaton v. Blackburn, 22.

"MUNICIPALITY."

The terms "municipality" and "district," used in Const. Or. Art. IV, § 1a, reserving the initiative and referendum powers to the legal voters of municipalities and districts, are of the same import, meaning a designated part of the state organized to promote those conveniences of the public at large which are inherently local and special.

Acme Dairy Co. v. Astoria, 520.

"OPENLY."

Keeping a pool room where bets are made on horse races or other contests is an act "openly" outraging public decency under Section 1930, B. & C. Comp.

State v. Ayers, 61.

"OWNER."

The term "owner," as used in B. & C. Comp. § 1830, prohibiting a trespass by one not the owner of the land nor an officer on lawful business, is not limited to the holder of the fee-simple estate, but also includes one holding merely a usufructuary interest. *Binkhoff v. State*, 419.

"SPECIFIC BEQUEST."

A "specific bequest" is a testamentary gift of a part of testator's personalty so accurately described that it can be identified from all other things of its kind. *Noon's Estate*, 288.

"TRANSFER."

The word "transfer" never means an extinguishment or destruction as applied to a debt. It means only a passing over of some right to the debt from one person to another. *Miles v. Bowers*, 434.

E. J. J.
7/17/08

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